Supreme Court, U.S.
FILED

94 362 AUG 29 1994

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NO. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NORMA I. ACEVEDO-VILLALOBOS, AND THE OTHER PETITIONERS IDENTIFIED IN APPENDIX I-1 TO I-8

PETITIONERS

V.

HON. RAFAEL HERNANDEZ, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a final decision within the meaning of 28 USC 1291, where the district court dismissed only the original complaint, grounded on the insufficiency of the pleadings, but without dismissing the underlying causes of actions nor stating that all relief be denied, **as to which the courts of appeals are in a real, intolerable and square conflict.**

2. Whether there is a final decision pursuant to 28 USC 1291, where petitioners had a right to amend their complaint once as a matter of course after the district court had merely dismissed the original complaint, grounded on the insufficiency of the pleadings, but without dismissing the underlying causes of actions, **as to which the courts of appeals are in a real, intolerable and square conflict.**

3. Whether the appellate court below erred in applying the correct legal standards for review for purposes of 28

USC 1291, in cases of multiple parties and claims where the district court dismissed only the complaint without dismissing the causes of actions.

4. Whether there is a final decision within the meaning of 28 USC 1291, in a multiple parties and claims lawsuit where the district court granted a motion to dismiss as to only one party defendant dismissing only the original complaint, grounded on the insufficiency of the pleadings, but without dismissing all the underlying causes of actions nor stating that all relief be denied.

5. Whether Rule 58 of the Fed. R. Civ. P. mandatorily requires that all relief be denied for purposes of 28 USC 1291, in a multiple parties and claims lawsuit, where the district court dismissed the complaint as to only one party without dismissing all the causes of actions.

6. Whether there is a final decision under 28 USC 1291, in cases where the district court dismissed only the complaint grounded on the insufficiency of the pleadings,

while at the same time its Opinion and Order implicitly invited petitioners to file their first amended complaint, and where the causes of actions could have been cured and saved by amendment with permission of the district court under Rule 15 (a) of the Fed. R. Civ. P.

7. Whether the district court's denial of leave to amend the complaint, after it had only dismissed the original complaint grounded on the insufficiency of the pleadings, constitutes a final decision under 28 USC 1291.

LIST OF PARTIES

The petitioners, who were the parties to the proceedings below whose judgment is sought to be reviewed, are the following: Because the total number of petitioners are so voluminous, the list of the names of all the petitioners are included in Appendix I-1 TO I-8, infra which is made an integral part of this petition.

The name of respondents are the following: Hon. Rafael Hernández Colón, former governor of Puerto Rico, in his personal and official capacity; Hon. Jack Kemp, former Secretary of the Federal Department of Housing and Urban Development, in his personal and official capacity; Rosa C. Villalonga, Manager, Caribbean Office of HUD, in her personal and official capacity; Raymond A. Harris, Regional Administrator and/or Regional Housing Commissioner of HUD, in his personal and official capacity; Rosaura González Rucci, former acting Secretary of the Puerto Rico Department of Housing, in

her personal and official capacity; Norma Pérez Giraud, former Administrator of the Puerto Rico Public Housing Administration, in her personal and official capacity; Manuel López Rodríguez, former Interim Administrator of the Puerto Rico Public Housing Administrtion, in his personal and official capacity; Rigoberto Figueroa Figueroa, former unconfirmed appointed Secretary of the Department of Housing of the Commomwealth of Puerto Rico, in his personal and official capacity; the federal Department of Housing and Urban Development (HUD),a federal agency of the United States of America; the United States of America; individual members of the Auction Board of the Puerto Rico Public Housing Administration, all sued in their official capacity, whose members name are Hermenegildo Ortiz Quiñones, former Secretary of Puerto Rico Department of Public Works, Juan Labadie Eurite, former President of the Governmental Bank of Puerto Rico, Isabel Pico de

Hernández, Dr. Efraín González Tejera, Dr. Antonio Santiago Vázquez, Economist Julio García Passalaqua, José Rovira Abarca, and Attorney Bernardo Hernández Berrios, Director of the Legal Division of the Puerto Rico Department of Housing.

There are no parent or subsidiary companies in this case.

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Stern, Gressman, Shapiro and
Geller, Supreme Court Practice
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9 Moore's Federal Pratice, (2d. ed. 1993) 47

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,

PETITIONERS

V.

HON. RAFAEL HERNANDEZ, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

Comes now petitioner Norma I. Acevedo -Villalobos, and the other petitioners listed in Appendix I-1 to I-8,

infra,[1] and very respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., Infra, A-1 to A-31) is reported at 22 F.3d 384. The opinion of the district court is at Appendix C-1 to C-10, infra.

JURISDICTION OF THIS HONORABLE COURT

The court of appeal entered its decision and judgment on April 28, 1994 (App., infra, A-2). On May 11, 1994, petitioners filed in the court of appeals a timely petition

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[1] **All the petitioners were listed in Appendix I-1 to I-8, infra, because they are voluminous in number. The petitioners listed therein, are an integral part of this petition.**

for rehearing, within the 14 days allowed by Rule 40 of the Federal Rules of Appellate Procedure. On June 7, 1994, the court of appeals denied the petition for rehearing (App., infra, B-1 to B-2). On June 15, 1994, the court of appeals below issued the mandate in the case. The jurisdiction of this Honorable Court is invoked under 28 USC 1254 (1), 28 USC 2101 (c) and Rule 13 (.1) (.4) of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

Section 1291 of Title 28 of the United States Code provides, in relevant part, that "[t]he courts of appeals...shall have jurisdiction of appeals from **all final decisions** of the district courts of the United States". Other statutory provisions involved in this case are as follows: Rule 58 of the Fed. R. Civ. P.(App., infra H-1); Rule 54 (a),(b) and (c) of the Fed. R. Civ. P. (App., infra

H-1 to H-3); Rule 15 (a) of the Fed. R. Civ. P. (App., infra, H-3); and Rules 3 and 4 of the Federal Rules of Appellate Procedure (App., infra, H-3 to H-4).

STATEMENT OF THE CASE

A. Background and Jurisdictional Basis in the Ditrict Court

On july 15, 1992, petitioners filed a multiple claims and parties lawsuit in the United States District Court for the District of Puerto Rico against various Commonwealth and federal officers[2], seeking injunctive, declaratory and

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[2] **The respondents in this action fall into two (2) groups: the United States of America, HUD, and various HUD officers, sued in their personal and official capacities (hereinafter, the "federal respondents"); and the former governor of the Commonwealth of Puerto Rico, and various officers from the Commonwealth's Department of Housing and the Public Housing Administration (P.R.P.H.A., the local public housing agency in Puerto Rico), sued in their personal and official capacities (hereinafter, the "state respondents"). (See App. infra, A-5).**

monetary relief. Petitioners, who were for the most part tenured public employees that worked for the Public Housing Administration of the Commonwealth of Puerto Rico (P.R.P.H.A.), a public agency created by law to administer, operate and provide maintenance to all public housing projects, filed their original complaint seeking recovery against the state respondents under 42 USC. sec. 1983 and its jurisdictional counterpart 28 USC 1343 and 1331 for violations of their constitutional rights under the First, Fifth and Fourteenth Amendments of the United States Constitution. Petitioners constitutional claims against the federal respondents were based on the doctrine set forth in Bivens v. Six Unknown Named Agents, 403 US 388 (1971).

On May 2, 1992, various officers from HUD, the former governor of Puerto Rico and various officers from the Puerto Rico's Department of Housing and the P.R.P.H.A, all of whom were sued in the present action, signed,

executed and implemented a Privatization Agreement (hereinafter, the Agreement). The Agreement called for the privatization of the operations, administration and maintenance of all public housing projects funded by HUD and/or the Commonwealth of Puerto Rico. The Agreement explicitly provided that the privatization process must begin on May 2, 1992, and conclude on August 1, 1992. During the implementation process of the Agreement, thousands of public employees were laid-off by officers of the Commonwealth's Department of Housing and by the PRPHA. Layoff letters dated June 26, 1992, were sent to PRPHA employees notifying them of their layoff, and advising petitioners that they may appear to present arguments or documentary evidence on his or her behalf. State respondents did not give petitioners enough time to prepare themselves for the hearings. Several petitioners were notified to appear at the alleged hearing within one (1) hour, or within one (1),

two (2) and three (3) days in advance. A second layoff letter was sent to those PRPHA employees that attended personally or in writing the hearing, which became a pro-forma one. Consequently, most of the petitioners were layoff effective on July 31, 1992 while the remaining petitioners were demoted and/or transferred.

The major causes of actions of petitioners' original complaint are as follows. First, petitioners allege that the privatization agreement is invalid (and consequently that the layoffs were illegal) because it was entered into in violation of **both** Puerto Rico law (law No. 66 of August 19, 1989 as amended by law no. 58 of August 9, 1991: 17 L.P.R.A. 1001-1014) and federal law, (42 USCA 1437d j (3) (A) et seq., 1993 Supp. Pamphlet). Basically, petitioners allege that such section was violated because the Secretary of HUD had not declared the P.R. Housing Administration (local PHA) in "substantial default" **prior** to the privatization agreement, which was a legal mandate.

They allege that the various state and federal respondents acted **ultra vires** by signing, approving and implementing the Agreement. Second, petitioners contended in their complaint that they had a property interest in their job positions under state law, and that state respondents deprived them of this property without the procedural Due Process of Law guaranteed by the Fourteenth Amendment.[3] Third, and under a different set of facts separable from the other claims, petitioners alleged that various state respondents, as well as one (1) federal respondent, made derogatory comments about them in public thereby depriving petitioners of "liberty" without due process as held and set forth in **Paul v.**

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[3] **As held by this Honorable Court in Cleveland Board of Education v. Lourdermill, 470 US 532 (1985); and as held by the First Circuit in Cordero v. De Jesús-Méndez, 867 F2d 1,18,20,22 (1st Cir. 1989) (layoff irregular employees who "had a property interest in their job under state law", had a right to a due process hearing before termination).**

Davis, 424 US 693 (1976). Finally, petitioners alleged under a different set of facts, that the layoff process implemented by the state respondents was unconstitutional, because the state respondents were finding and providing new jobs in other government agencies only to those employees who belong to the political party then in power and control of the Commonwealth's government, therefore illegaly discriminating against petitioners for political beliefs and association rights in violation of the First and Fourteenth Amendments of the United States Constitution.

B. **Proceedings Below; Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented; and Jurisdictional Basis in the Court of Appeals for the First Circuit**.

On July 15, 1992, petitioners filed the original complaint within the district court. State respondents did not file an answer to the complaint but filed a Motion to Dismiss and/or for Summary Judgment, dated October

27, 1992 (App. infra, G-2 and G-3). Petitioners file their response to state respondents motion to dismiss and/or for summary judgment. Federal respondents filed within the district court their responsive pleadings, dated October 28, 1992 (App. infra, G-3). On January 15, 1993, the district court issued a six (6) page Opinion and Order, whereby granted **only** state respondents Motion to Dismiss dated October 27, 1992 (App., infra, C-1 to C-10) pursuant to Rule 12 (b) (6) of the Fed. R. Civ. P., and dismissed **only** petitioners original complaint (App., infra, C-9 and C-10). The district court's Opinion and Order was grounded and based on the Complaint's failure to state sufficient pleadings and statements of facts as to who did what to whom and why (App., infra C-8 and C-9).[4] Relying on the heightened pleadings standards for

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[4] **Federal and state respondents did not specifically argued nor alleged within the district court in their respective motions to dismiss, whether the original complaint's pleadings and**

civil rights cases held in **Dartmouth Review v. Dartmouth College**, 889 F2d 13, 16 (1st Cir. 1989) and **Correa-Martínez v. Arrillaga-Beléndez**, 903 F2d 49,51 (1st Cir. 1990), the district court concluded that in the case at hand it was required a fair degree of specificity of the statements of facts and pleadings in order to survive a motion to dismiss. (App., infra, C-8 to C-9).[5] Therefore, the district court below reviewed and dismissed petitioners complaint under the heightened specificity pleading standards. (In **Leatherman v. Tarrant County Narcotics Units**, 113 S. Ct. 1160. 1162 (1993), this Honorable Court left unresolved the question whether the

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statement of facts were insufficient or not as to who did what to whom and why.

[5] **See Boston and Me Corp. v. Hampton, 987 F.2d 855,866 (1st Cir. 1993), citing and construing Dartmouth Review, supra, and Correa-Martínez, supra, as holding that in the First Circuit is required the heightened pleadings standards in civil rights cases against state government officers under 42 USC 1983.**

Court's qualified immunity jurisprudence would require a heightened pleading standards in cases involving individual government officials. It held, however, that in civil rights cases under section 1983 against local municipal corporations and officers alleging municipal liability, the federal courts cannot apply heightened pleading standards more stringent than usual notice pleadings under Rule 8 (a) (2) of the Fed. R. Civ.P.). See 113 S. Ct. at 1162-1163.

The Opinion and Order dated January 15, 1993, did not make any reference whatsoever to federal respondents Motion to Dismiss, nor stated that said Motion to Dismiss was granted or denied although such motion was entered in docket on January 13, 1993. (App., infra G-3 and G-4). Furthermore, the January 13, 1993 docket entry within the district court stated that petitioners had to file a response to federal respondents motion to dismiss by January 25, 1993. (App., infra, G-

3 to G-4). On January 20, 1993, petitioners filed a motion to extend the time until February 16, 1993, to respond to federal respon-dents motion to dismiss. (App., infra, G-4). On March 3, 1993, the district court declared moot this request (App., infra, G-7).

The district court Opinion and Order dated January 15, 1993, implicitly invited and induced petitioners to file their first amended complaint when it stated the following (App., infra, C-9).: "**It is unfortunate that although the defendants' conduct may in fact be actionable,** the Court has not been put in a position to even begin to evaluate the alleged constitutional violations." (Emphasis ours). In its Opinion and Order, the district court did not reviewed all the causes of actions included in the original complaint, in order to determine whether there were sufficient statement of facts as to each claim. For example, the district court did not reviewed the cause of action in which petitioners alleged that state government

officers were discriminating against petitioners when state respondents were finding and providing jobs during the inital layoff process **only** to PRPHA employees that belong to the political party in power and control of the Commonwealth's government, in violation of petitioners beliefs and association rights guaranteed by the First Amendment. On January 15, 1993 , on the same day it issued the Opinion and Order, the district court also issued a separate document judgment whereby it granted **only** state respondents motion to dismiss, and it dismiss **only** petitioners original complaint (App., infra, D-1). The district court's separate document judgment dated January 15, 1993, did not stated that it denied all relief nor that it was dismissing the underlying causes of actions giving finality to its desicion and did not make reference whatsoever to federal respondents motion to dismiss.

The district court civil docket in the instant case

contains the following statements regarding the district court's Opinion and Order (identified as O and O) and separate document judgment (App., infra, G-4): "OPINION AND ORDER granting [11-1] motion to Dismiss, etc. as stated herein"; "JUDGMENT pursuant to O and O entered this date, the complaint is hereby dismissed." On February 1, 1993, petitioners filed within the district court three (3) documents, as follows: a Motion for Reconsideration and Request to Amend Complaint; a Memorandum of Law in Support of Motion to Amend Complaint as per Rule 15; and a proposed first amended complaint. On February 12, 1993, petitioners filed a document entitled "Supplemental Arguments to our Motion for Reconsideration". On February 26, 1993, federal respondents then filed within the district court a document entitled "Federal defendants Brief in Response to Plaintiffs Brief Entitled "Supplemental Arguments to Our Motion for Reconsideration" (App., infra G-6), which

requested the district court, among others things, that "**the case against them should be dismissed**".[6] On March 3, 1993, the district court issued an Order **whereby stated only** that it "**denied**" petitioners motion requesting leave to amend the original complaint (App., infra E-1), which was entered on docket on March 9, 1993. (App. infra, G-7 and G-8). On March 15, 1993, petitioners filed within the district court a document entitled "Motion for Reconsideration of Last Decision Issued and Entered by the Honorable Court". On April 19, 1993, the district court issued an Order whereby it "**denied**" petitioners motion for reconsideration filed on March 15, 1993, and also stated the following: "**The**

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[6] **Since the district court's Opinion and Order and separate document judgment, both dated and issued on January 15, 1993, did not make any reference whatsoever to federal respondents motion to dismiss, it certainly appears that federal respondents decided to request the district court on Febrary 26, 1993 that "the case against them should be dismissed".**

case is closed. The Court cautions the plaintiffs not to abuse the procedures of Rules 59 and 60." (App., infra, F-1). The district court did not issued a decision nor an Order regarding federal respondents request thru their motion filed on February 26, 1993, in which petitioned the district court that the case against them should be dismissed.

Petitioners contends that the district court's Order stating that "**the case is closed**" constituted the final decision under 28 USC 1291, and therefore the clock starts to click for appeal purposes from April 22, 1993, date in which said final decision was entered in the civil docket. (App., infra, G-8 and G-9). The jurisdictional basis in the court of appeals was invoked pursuant to 28 USC sec. 1291 and Rules 3 and 4 of FRAP. Petitioners filed their Notice of Appeal on May 14, 1993. The Court of Appeals for the First Circuit issued an opinion (App., infra, A-1 to A-31), reported at 22 F3d 384 (1st Cir. 1994),

where it held that it lacked jurisdiction to entertain the dismissal of the complaint because petitioners notice of appeal was filed untimely in its circuit (App., infra, A-3 and A-22). The First Circuit started to count the appeal time from March 9, 1993, after considering and deciding that petitioners motion filed on February 1, 1993, requesting leave to amend their complaint (App. infra, G-5), tolled the appeal time (App. infra, A-12 and A-13). Petitioners contend that the appeal time starts to click on April 22, 1993, date in which the district court closed the case. It also establishes a new judicial doctrine in its circuit holding that when the district court uses the words the complaint is dismissed, whithout expressly granting plaintiffs leave to amend, "this is a final decision" from which a timely appeal may be taken". (App. infra, A-22) As to this new doctrine the First Circuit explicitly acknowledged the existence of a three (3) different view conflict among the courts of appeals (App., infra, A-13, to

A-15).

The First Circuit also concluded that a plaintiff's time to amend his or her complaint as a matter of right within the First Circuit terminates upon a district court's dismissal of the complaint, as to which acknowledged that the courts of appeals are in a real conflict. (App., infra, A-15, A-21). The court of appeals below applied as the only controlling and decisive factor, for determining that the dismissal of the complaint was a final decision within the meaning of 28 USC 1291, the mere fact that the district court issued a separate document judgment, without considering the district court's Opinion and Order issued on the same day; nor considering the district court record. This rationale and standards for review employed by the court of appeals, who failed to review the district court's record in determining that the dismissal of the complaint constituted a final decision under 28 USC 1291, completely departs from the holding set forth by

this Honorable Court in **Bankers Trust Co. v. Mallis**, 433 US 381, 385,386 (1978). Finally, the First Circuit wrongly concluded that the requirements of Rule 54 (b) of the Fed. R. Civ. P. were not implicated in this case (App., infra A-11).

REASONS FOR GRANTING THE PETITION

1- **The Court of Appeals For the First Circuit Decision Conflicts with other Courts of Appeals Rulings on the Same Issues.**

As the First Circuit acknowledged, "[t]his appeal raises a procedural question of **first impression** in our circuit: whether the dismissal of a complaint, which does not explicitly dismiss the action, constitutes a "final decision", and is therefore appealable under 28 U.S.C. sec. 1291... **We have never ruled on this procedural dilemma**. It has, however, given rise to some **disagreement among those circuits that have. Three distinct views have**

emerged." (Emphasis added). (App., infra A-3, A-14).

But the First Circuit's decision did not pinpoint all the actual conflicts on these issues among **all** the courts of appeals. The First Circuit recognized and viewed the square conflict **only** between sister circuits **Seventh and Ninth** on one hand, the sister circuits **Second and Eight** on the other, and the irtermediate approach on the same issue held by sister circuit **Eleventh**. (App. infra, A-14 to A-15). In **Czeremcha v. International Assocaition of Machinists and Aerospace Workers**, 724 F2d 1552, 1554 (11th. Cir. 1984), **a case cited by the First Circuit's decision in this case** (App., infra, A-15), the Court stated in relevant part: "Those courts that have considered the question of whether dismissal of a complaint is a final order are of different views.... The Ninth, **Sixth and Third Circuits**, in contrast, distinguish between a dismissal of the complaint and a dismissal of the action, holding that only the latter constitutites a final order, unless the trial

court has made clear in dismissing the complaint that the action could not be saved by amendment....**Azar v. Conley** 480 F2d 220, 222-223 (6th cir. 1973); **Borelli v. City of Reading**, 532 F2d 950, 951-52 (3rd Cir. 1976)." (Underlying ours).

In sum, the real, square and live conflict among the courts appeals, regarding the question of whether a dismissal of the complaint without dismissing the causes of actions constitutes a final decision under 28 USC 1291, can best be resumed as follows:

a- Five (5) circuits (Seventh, Ninth, Third, Sixth and Tenth) have held that a dismissal of a complaint without expressly dismissing the causes of actions, is not a final decision pursuant to 28 USC 1291, and therefore is not appealable, **unless the district court has made clear in dismissing the complaint that the action could not be saved by amendment**. For the Seventh Circuit, see **Benjamin v. United States**, 833 F2d 669, 671, 672

(7th Cir. 1987), and **Paganis v. Blonstein** 3 F3d 1067, 1068, 1069, 1070, 1071 (**1993**) **(a separate document judgment entry which dismisses only the complaint is not a final judgment for appeal purposes under 28 USC 1291)**; for the Ninth Circuit, see **Ruby v. Secretary of United States Navy**, 365 F2d 385, 387 (9th Cir. 1966), cert. denied, 386 US 1011 (1967), and **Firchau v. Diamond National Corp.**, 345 F2d 269 (9th Cir. 1965); for the Third Circuit, see **Borelli v. City of Reading** 532 F2d 950, 951-952 (3rd Cir. 1976), **Batoff v. State Farm Insurance Co.,** 977 F2d 848, 851 (3rd Cir. 1992), at footnote 5, and **In Re Flanagan**, 999 F2d 753, 755 (3rd Cir. 1993); for the Sixth Circuit, see **Azar v. Conley**, 480 F2d 220, 222-223 (6th Cir. 1973), quoting with approval **Ruby v. Secretary of United States Navy**, supra, and citing **Jung v. K and D Mining Co.**, 356 US 335 (1958); and for the Tenth Circuit, see **Sherman v. American Federation of Musicians**, 588 F2d 1313, 1315 (10th Cir.

1978), **Midwestern Developments, Inc. v, City of Tulsa, Oklahoma**, 319 F2d 53 (10th Cir.), rehearing denied, 333 F2d 1009, **cert. denied**, 379 US 989, 85 S.Ct. 702, 13 L Ed 2d 610 (1964), and **Crutcher v. Joyce**, 134 F2d 809, 813, 814 (10th Cir. 1943), this case cited by **Jung v. K and D Mining Co.,** 356 US 335, 337 (1958).

(b) Three (3) circuits (Second, Eight and First) have held that a dismissal of a complaint, absent an express grant of leave to amend, is a final decision pursuant to 28 USC 1291 and therefore appealable. For the Second Circuit, see **Weisman v. Lelandais**, 532 F2d 308, 309 (2d Cir. 1976),and **Elfenbein v. Gulf and Western Indus. Inc.,** 590 F2d 445, 448 (2d Cir. 1978); for the Eight Circuit, see **Quartana v. Utterback**, 789 F2d 1297, 1300 (8th Cir. 1986); and for the First Circuit, see only **Norma I. Acevedo-Villalobos v. Rafael Hernández**, 22 F3rd 384 (1st Cir. 1994), which is the decision sought to be reviewed by this petition.

(c) Two (2) circuits (Eleventh and Fifth) have adopted an intermediate approach, holding that dismissing only the complaint (without explicitly dismissing the causes of actions) does not by itself automatically terminate the action unless the court holds either that no amendment is possible or that the dismissal of the complaint also constitutes a dismissal of the action. For the Elevent Circuit, see **Czeremcha v. International Ass'n of Mach. and Aero. Workers**, 724 F.2d 1552, 1555 (11th Cir. 1984); and for the Fifth Circuit, see **Whitaker v. City of Houston, Tex.**, 963 F2d 831, 835 (5th Cir. 1992)[7].

The First Circuit decision below adopted the

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[7] **We have not found any caselaw from the Court of Appeals for the Fourth Circuit, the District of Columbia Circuit and the Court of Appeals for the Federal Circuit, thus it appears that these three (3) circuits have not yet decided on this issue. See 15A Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d, section 3914.1, (2d ed. 1993), at pages 493 and 494, stating that not all courts of appeals have decided on this issue.**

minority view held by the Second and Eight Circuits.

Since the issuance of a separate document judgment is not a prerequisite to appellate jurisdiction under 28 USC 1291, **Bankers Trust Co.,** supra, 435 US at 382 and 383, the main issue remains whether the district court's dismissal of the complaint constitutes a final decision under 28 USC 1291 irrespective of whether the district court dismissed the complaint thru an Order, or thru a separate document judgment, or thru both. In any event, however, in this case the district court's Opinion and Order and separate document judgment were both dated and issued on the same day, and both dismissed merely the complaint as to only state respondents and did not dismissed all the causes of actions. See Rules 54 (a) and (c) of the Fed. R. Civ. P. (App., infra H-1, H-3).

These conflicts are not an inconsistency in dicta or in the general principles utilized. The three (3) different views in the present case represent **a real, truly, into-**

lerable and square conflict on very important questions of appellate jurisdiction under 28 USC 1291, and very important questions regarding the statutory construction of Rules 58, 54(b) and 15(a) of the Fed. R. Civ. P. See **Firestone Tire and Rubber Co. v. Risjord**, 449 US 368, 373 (1981)(certiorari granted to resolve a conflict among the circuits on the appealability question as to certain district court decisions).

The conflict in this case will have continuing future recurrence consequences among the courts of appeals that have decided the question, and among those Circuits that have not. The recurring nature of the issues in conflict is self evident among the court of appeals that have already decided these questions, because said circuits frecuently continue to receive appeals reiterating the same federal issues previously resolved by them. See for example the Second Circuit, where after **Weisman v Lelandais,** supra, multiple other appeals

have been filed within that circuit regarding similar issues of federal law (whether a dismissal of a complaint constitutes a final decision under 28 USC 1291) decided by the **Weisman** Court. To be sure, those courts of appeals that have not yet decided the federal questions herein presented will have future consequences, because said Circuits will have to sooner or later confront and decide whether to establish a new approach or otherwise decide which approach to adopt among those courts of appeals that have already decided such issues. **Most respectfully, unless this Honorable Court excercises its supervisory powers in order to establish uniform and clear rulings on these questions of federal law, which are ripe enough for review,** the current proliferation that amounts to three (3) different holdings today on most important issues of appellate jurisdiction under 28 USC 1291, would probably amount tomorrow into four, five or six conflicting and confusing views among the

courts of appeals on the same matter of federal law. Moreover, there is little, if none, possibility that 28 USC 1291 will be amended to introduce a provision resolving the conflicts presented herein for review.[8] Honorable Justice Stevens has stated that "the existence of different rules of law in different sections of our great country is not always an intolerable evil... **It would be better, of course, if federal law could be applied uniformly in all federal courts**, but **experience** with conflicting interpretations of federal rules [of law] **may help to illuminate an issue** before it is **finally resolved** and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial

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[8] **In 1990, Congress authorized this Honorable Court to prescribe rules that define when a ruling of a district court is final for appeal purposes under 28 USC 1291. See 28 USC 2072 (c). The commentaries on the 1990 amendment states that "[i]n the absence of rules on the matter [referring to 28 USC sec. 2072 (c)], caselaw will continue to determine finality under section 1291." See 28 USC sec. 2072.**

resolution of conflicts may sometimes produce the most desirable result." See Stern, Gressman, Shaphiro and Geller, Supreme Court Practice, section 4.4, page 171, (7th ed. 1993). On the other hand, Justice Brennan revealed that "there is already in place, and has been ever since I joined the Court a policy of letting tolerable conflicts go unadressed until **more than two courts** (our emphasis) of appeals have considered a question", id, at page 171.

The need for quidance by this Honorable Court is acute. In our opinion, this case is a timely and rare opportunity for this Honorable Court to provide quidance to all federal courts in the judicial system, to the federal bar and to prospect litigants that certainly may face these questions in the near future. There is ample consideration and discussion of these same issues of federal law by at least ten (10) Circuits, therefore, experience with conflicting interpretations has helped to illuminate these

issues before they are finally resolved by this Honorable Court. The time is ripe for this Honorable Court to make uniform law to be applied throughout our great country in all the federal judicial system. It has been said that this Honorable Court may feel that the time is not ripe to resolve a conflict "preferring to await further litigation that might produce a consensus **or a satisfactory majority view among the lower courts**." See Stern, Gressman, Shapiro and Geller, Supreme Court Practice, section 4.4., at page 170, footnote 19, (7th ed. 1993). The issue in this case presents a satisfactory majority view taken by five (5) Circuits (the Seventh, Ninth, Sixth, Third and Tenth), all of which have held that a district court's dismissal of a complaint is not a final decision under 28 USC 1291.

We have emphasized that these conflicts are intolerable. The consequences of intolerable conflicts among the courts of appeals on the same issues of federal law,

> avoids confusion over when a plaintiff's right to amend a dismissed complaint terminates, the order becomes final, and the time for appeal begins to run.

Quartana, 789 F.2d at 1300.

The "intermediate approach" taken by the Eleventh Circuit was grounded in that court's desire to formulate a rule consistent with "Rule 15's liberal mandate that leave to amend be `freely given when justice so requires,' without granting the plaintiff carte blanche power to reopen a case at will by filing an amendment." Czeremcha, 724 F.2d at 1554-55. Under this approach, "[a]lthough the palintiff does not have a right to amend as a matter of course after dismissal of the complaint [see supra note 5], the dismissal itself does not automatically terminate the action unless the court holds either that no amendment is possible or that hte dismissal of the

complaint also constitutes dismissal of the action." Id. at 1554 (footnotes omitted).

We find the reasoning employed by the Eighth Circuit to be compelling, and thus adopt the approach embraced by that court and the Second Circuit. Our conclusion that the order in this case is final is strengthened by several factors. First, consistent with the Second and Eighth Circuits, a plaintiff's time to amend his or her complaint as a matter of right within the First Circuit terminates upon a district court's dismissal of the complaint. See Jackson v. Salon, 614 F.2d 15,17 (1st Cir. 1980). Second, the dismissal of the complaint in the present case was set forth in a separate document, as required for final judgments under Fed. R. Civ. P. 58. See Quartana, 789 F.2d at 1300 n.2. Third, plaintiffs, as evidenced by their Rule 59(e) motions, apparently

understood the judgment to be final. See id.[6] And finally, the dismissal of the complaint fits comfortably under the Supreme Court's definition of a "final decision." The Court has defined a "final decision" as one that" `ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368. 373-74 (1981) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b) (6) is a decision on the merits. See Local No. 714 v. Greater Portland Transit Dist., 589 F.2d 1, 6 (1st Cir. 1978); see also 5 James W. Moore et al., Moore's Federal Practice ¶ 41.14 at 41-170 (2d ed. 1993). Here the complaint was dismissed by the district court for failure to state a claim, and judgment was then

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[6] **Thus, it appears that plaintiffs have constructed their present argument after the fact in an attempt to preserve appellate review of the dismissal of their complaint.**

entered on the docket and set forth on a separate document in accordance with Fed. R. Civ. P. 58 and 79(a). Accordingly, the dismissal of plaintiffs' complaint possesses all of the markings of a "final decision".

In short, we hold that when a district court uses the words, "The complaint is dismissed," without expressly granting the plaintiff leave to amend, this is a "final decision" from which a timely appeal may be taken. Because there was not a timely appeal taken by plaintiff we lack appellate jurisdiction over their attack on the dismissal of the complaint.

Plaintiffs also argue that the second motion to reconsider, which was served within 10 days of the denial of the first motion, extended the time period for filing a notice of appeal from the dismissal of the complaint, thereby rendering the notice timely. This argument has no merit. It is well settled that a motion for

reconsideration served more than ten days after the entry of judgment does not effect the time for appealing from that judgment. See Feinstein v. Moses, 951 F.2d 16, 18 (1st Cir. 1991); Fed. R. App. P. 4(a) (4); see also 6A Moore, supra ¶ 59.13[3] at 59-282 (A [second] motion for reconsiderration that is served more than ten days after the entry of judgment has no effect upon appeal time, which runs from the entry of the original order denying. . . an alteration or amendment of the judgment."). Because plaintiffs' second motion for reconsideration was served two months after entry of the judgment dismissing the complaint, it was untimely under Rule 59(e), and did not toll the appeal period for that judgment. See Jusino v. Zayas, 875 F.2d 986, 989 (1st Cir. 1989).[7]

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[7] **In addition, plaintiffs appeal from the district court's decision to stay discovery pending the resolution of the state defendants' motion to dismiss or for summary judgment. As a result of the foregoing discussion, we lack jurisdiction over this appeal.**

B. Postjudgment Motions for Reconsideration

Where, as here, a complaint is dismissed without leave to amend, the plaintiff can appeal the judgment, or alternatively, seek leave to amend under Rule 15(a) after having the judgment reopened under either Rule 59 or 60. Unless postjudgment relief is granted, the district court lacks power to grant a motion to amend the complaint under Rule 15(a). See Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 781 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989); see also 3 Moore supra ¶ 15.10 at 15-107 ("[A]fter a judgment of dismissal plaintiff must move under Rules 59(e) or 60(b) to reopen the judgment."); 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1489 at 692-93 (1990) ("[O]nce judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60.").

On February 1, 1993, within ten days of the entry of judgment, plaintiffs served a motion for reconsideration and/or to alter or amend the judgment pursuant to Rule 59(e), together with a motion to amend the complaint accompanied by a proposed amended complaint.[8] On February 12, plaintiffs filed a document entitled "Supplemental Arguments to our Motion for Reconsideration." These supplemental arguments were an expansion of several arguments made by plaintiffs in the Rule 59(e) motion. On February 26, federal defendants filed a response to plaintiffs' supplemental arguments. Finally, on March 3, the district court denied plaintiffs' motion for reconsideration, effectively denying their motion for leave to amend the complaint. The court

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[8] **The motion also cites Rule 60(b) (6) but identifies no "extraordinary circumstances" that might bring this provision into play. Vargas v. Gonzalez, 975 F.2d 916, 917-18 n.1 (1st Cir. 1992).**

declined to address plaintiffs' supplemental arguments, indicating that they were "moot."[9]

On March 15, 1993, plaintiffs filed a second motion for reconsideration under Rule 59(e). We note that plaintiffs' second motion for reconsideration did not specifically invoke Rule 59(e), or for that matter, any federal rule. Nonetheless, we have consistently held that "'a motion which ask[s] the court to modify its earlier disposition of the case because of an allegedly erroneous legal result is brougth under Fed. R. Civ. P. 59(e).'" Feinstein, 951 F.2d at 19 n.3 (quoting Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1513 (1st. Cir. 1991)); 789 Cases of Latex Surgeon Gloves, 13 F.3d at 14 ("[A] post judgment motion asking the court to change its disposition solely because of legal error must be brought

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[9] **Plaintiffs do not appeal from the court's order declining to address the supplemental arguments.**

under Rule 59(e)." (emphasis in original)). Where, as here, the motion sought to set aside the court's prior rulings solely on the basis of alleged legal errors, it is properly treated as a motion brougth under Rule 59(e).

On April 21, the district court denied the second motion to reconsider and warned plaintiffs that it would no longer entertain motions for postjudgment relief. Plaintiffs appeal from the district court's orders denying both postjudgment motions. We have consistently held that an order denying a Rule 59(e) motion challenging the judgment constitutes a "judgment," and is therefore appealable separately from the appeal of the underlying judgment. Kersey v. Dennison Mfg. Co., 3 F.3d 482, 485 n.6 (1st Cir. 1993); Fiore v. Washington Cty. Mental Health Ctr., 960 F.2d 229, 233 (1st Cir. 1992).

In this case, plaintiffs' original Rule 59(e) motion was timely, i.e., it was served within ten days of the judgment,

excluding intermediate weekends and holidays, as required by Fed. R. Civ. P. 6(a). But plaintiffs' notice of appeal was not filed until sixty-four days after the denial of this motion, and therefore the notice was untimely. See supra page 7. Plaintiffs argue, however, that their second Rule 59(e) motion (served within ten days of the denial of the original Rule 59(e) motion) extended the time period within which to file a notice of appeal from the order denying the original motion. Id.[10] Because the notice of appeal was filed within sixty days from the entry of the order denying the second motion, plaintiffs conclude that the notice was timely with respect to both postjudgment motions. We disagree.

Although it was entitled "Motion for Reconsideration of

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[10] **We have already determined that plaintiffs' second Rule 59(e) motion did not extend the time for filing a notice of appeal from the dismissal of the complaint. See supra p. 13-14.**

the Last Decision Issued and Entered by the Honorable Court," plaintiffs' second Rule 59(e) motion was an obvious attempt to have the district court revisit the legal basis for its January 15, 1993 opinion and order dismissing the complaint. In their second motion to reconsider, plaintiffs merely elaborated on various legal arguments that were addressed, albeit in less detail, in their original Rule 59(e) motion. Thus, plaintiffs not only requested the same relief in the second Rule 59(e) motion as they did in the first, including, inter alia, that (1) "[t]he judgment dismissing the complaint be set aside," and (2) "[d]iscovery proceedings be allowed to continue," they sought that relief on the same grounds. Accordingly, plaintiffs' second Rule 59(e) motion must be viewed as a motion to reconsider the judgment dismissing the complaint. See Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 26 (1st. Cir. 1988)

("nomenclature should not be exalted over substance") ("`quoting Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 41 (2d Cir. 1982))).

Because plaintiffs' second Rule 59(e) motion to reconsider was, in reality, a motion to reconsider the judgment dismissing the complaint, and it was untimely (not served within 10 days of entry of the judgment), the district court was without jurisdiction to grant it. Vargas, 975 F.2d at 918; Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 2-3 (1st Cir. 1989). Furthermore, the untimely second motion to reconsider could not enlarge the time for filing a notice of appeal from the order denying the original motion to reconsider. See Feinstein, 951 F.2d at 18; Fed. R. App. P. 4(a) (4).

Therefore, to the extent that plaintiff challenges the March 3, 1993 order denying the original Rule 59(e) motion, the appeal is dismissed for lack of appellate

jurisdiction. To the extent that they seek to challenge the April 19, 1993 order denying the second Rule 59(e) motion, the order is affirmed.

The judgment of the district court is **Affirmed.**

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 93-1544

NORMA I. ACEVEDO-VILLALOBOS, ET AL
PLAINTIFFS, APPELLANTS

V.

HON. RAFAEL HERNANDEZ, ET AL.,
DEFENDANTS, APPELLEES

BEFORE

Breyer, Chief Judge, Bownes Senior Circuit Judge
Torruella, Selya, Cyr, Boudin and Stahl, Circuit Judges

ORDER OF THE COURT

ENTERED: JUNE 7, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc

having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

Francis P. Scigliano

Clerk

[cc: Messrs. Hernandez-Sanchez, Gonzalez, Maldonado-Colon Ramirez-Rausz and Sevillano del Rio, Lugo-Fiol]

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ, et al *
*
Plaintiff *
vs. * CIVIL NO. 92-1972 (JP)
*
RAFAEL HERNANDEZ COLON, *
et al. *
Defendant *
*

OPINION & ORDER

The Court has before it defendants' Motion to Dismiss and/or for Summary Judgment dated October 27, 1992 (docket No. 11). For the reasons set forth below, the motion is hereby GRANTED.

I. Background

Plaintiffs, who are 230 tenured employees working for the Public Housing Administration of the Commonwealth of Puerto Rico (hereinafter "PHA"), a public entity created to administer all public housing projects in Puerto Rico, filed their complaint on July 15, 1992, seeking recovery

under 42 U.S.C. § 1983 for alleged violations of their rights under the First, Fifth and Fourteenth Amendments of the United States Constitution. The defendants are the United States of America and the Department of Housing and Urban Development ("HUD"), as well as the former Governor of Puerto Rico and various officials of HUD, the PHA, and the Puerto Rico Department of Housing, all sued in their official and personal capacities. Also named as defendants in their official capacities are various members of the Auction Board of the PHA.

Plaintiffs' primary allegation is that on May 2, 1992, HUD and PHA entered into an illegal Memorandum of Agreement ("MOA") for the privatization of all public housing ventures in Puerto Rico which resulted the termination of plaintiffs' employment. Plaintiffs also allege that the defendants made derogatory statements againts them in public and conducted public hearings which did

not comply with the due process requirements of the Fourteenth Amendment. Plaintiffs request broad relief from the Court, including the entry of an order restraining the defendants from terminating the plaintiffs, an order staying all further public hearings and declaring unconstitutional those already completed, and an order declariang the MOA unconstitutional. On October 7, 1992, a Motion to Intervene was filed by 63 additional PHA employees similarly terminated.

Defendants responded, on October 27, 1992, with their Motion to Dismiss and/or for Summary Judgment, which asserted that plaintiffs' complaint (i) failed to meet the standards of the "well-pleaded complaint" rule, (ii) failed to state a claim upon which relief could be granted, and (iii) requested monetary damages barred by the Eleventh Amendment. Plaintiffs responded to defendan's motion with a thread-bare opposition consisting primarily

of conclusory statements which leave naked the allegations of their complaint. The oposition is highlighted by a quotation from a speech made by President Bush in Houston during which he allegedly stated that "'something is fishy' in all this privatization business headed by the govenor of Puerto Rico."

II. Discussion

Rule 8(a) of the Federal Rules of Civil Procedure provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (2). A pleading must give the Court a fair idea of the plaintiffs' complaint so that it may discern whether there is some legal basis for recovery. Moore's Federal Practice § 8.13 at 8-73 (1992). Rule 12 (b)(6) requires that the Court accept as true the well-pleaded factual averments contained in the plaintiffs'' complaint, while at the same time drawing all reasonable

inferences therefrom in favor of the plaintiffs. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 276 (1976); Correa-Martinez v. Arrillaga-Beléndez, 903 F.2d 49, 51 (1st Cir. 1990); Dartmouth Review v. Dartmount College, 889 F.2d 13, 16 (1st Cir. 1989). On the other hand, this rule "does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of 'a general scenario which could be dominated by unpleaded facts.'" Correa-Martinez at 53 (citing Dewey v. University of New Hampshire, 694 F.2d 1,3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983)). As the First Circuit, speaking through Judge Selya, has stated, "[i]n the managerie of the Civil Rules, the tiger patrolling the courthouse gates is rather tame, but 'not entirely. . . toothless.'" Id. at 52 (quoating Dartmouth Review at 16).

Plaintiffs' complaint fails to provide the Court with a

clear idea of the contours of their claims and also fails to provide appropriate support for their allegations. The examples are manifold. Plaintiffs allege that they are career employees but fail to cite to any state law provision providing such a property interest. See Complaint ¶ 2. They cite to 42 U.S.C. § 1437d for a discussion of "trouble public housing agencies" although the provision makes no mention of the concept. See ¶ 4. They allege that derogatory statements againts them were made but provide no detail, such as the dates on which the statements were made. See ¶ 13. These and other omissions have left the Court utterly unable to follow plaintiffs' reasoning. Their complaint, while it may provide the Court with a smattering of colors, insufficiently illustrates the essential nature of their claim.

The Court us most confounded by plaintiffs' inability to sketch the basic outlines of their claim that the

defendants acted ultra vires in entering into the privatization agreement. Their complaint fails to make clear even the date on which the MOA was executed. See ¶ 5. The documents submitted in support of their opposition do not include a copy of the MOA. Plaintiffs' apparently wish to show that the MOA was in violation of various statutory provisions regarding the administration of public housing. The Court has struggled to understand this claim but has been unable to do so because of the lack of any reasonable explanation of the MOA and the relevant statutes.

The Court's frustration at these omissions in dwarfed, however, by its consternation at some of the absurd allegations which further sully plaintiffs' complaint. Plaintiffs state that most of the terminated plaintiffs are member of the rival political party of the former Governor. See ¶ 15. Since plaintiffs do not allege political

discrimination, however, these allegations appear intended only to cast an inappropriate veil of misconduct over the proceedings. Plaintiffs also state that the former Governor breached a "Social Contract" he made with the citizens of Puerto Rico to create jobs. Id. They do not, however, explain the nature of this "contract" or explain how it grants them federally protected property rights. Finally, they charge the former Governor with attempting to "act as a king or reign by decree." Such hyperbole has no place in documents filed before this or any court.

The First Circuit has stated that where a plaintiff alleges violations of the civil rights statutes "we insist that the claim at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why." Dewey, supra at 3; see also Gilbert v. Cambridge, 932 F.2d 51. 62 (1st Cir.), cert. denied, 112 S. Ct. 192 (1991) ("We have been particularly insistent in section 1983

cases to require a fair degree of specificity -- a foundation of material facts -- to survive a motion to dismiss.") This requirement grows out of the need in civil rights cases "to prevent abusive and unfair vexation of defendants." Correa-Martinez, supra, at 53 (citing Dartmouth Review at 16; Dewey at 3; Slotnick v. Staviskey, 560 F.2d 31,33 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978)).

Plaintiffs" complaint is infected with conclusory allegations and unfounded accusations. It is unfortunate that although the defendants' conduct may in fact be actionable, the Court has not been put in a position to even begin to evaluate the alleged constitutional violations.

The Court therefore ORDERS that defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is hereby **GRANTED** and that plaintiffs' complaint is hereby **DISMISSED.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 15 day of January, 1993

(SIGNED)

JAIME PIERAS, JR.

U.S. DISTRICT JUDGE

APPENDIX D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ, et al.	*	
	*	
PLAINTIFF	*	
	*	CIVIL NO.92-1972 (JP)
VS.	*	
	*	ENTERED ON
RAFAEL HERNANDEZ COLON,	*	DOCKET 1/19/93
et al.	*	PURSUANT TO
	*	FTCP RULES
	*	58 AND 79a
Defendants	*	
	*	

JUDGMENT

By virtue of the Opinion & Order of the Court, entered on this date, it is hereby **ORDERED, ADJUDGED and DECREED** that plaintiffs' complaint is DISMISSED.

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, this 15 day of January, 1993.

(SIGNED) JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

APPENDIX E-1

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

MANUEL GONZALEZ, et al.

v.

HON. RAFAEL HERNANDEZ COLON, et al.

CASE NO. CV 92-1972 (JP)
ORDER

MOTION	RULING
Date : Filed: 2/01/93 Docket #31	* DENIED. *
(x) Plffs ( ) Defts	*
( ) Other	*
Title: Motion for Reconsideration and or to Alter or Amend Judgment	* *
under Rule 59 (e) and Request of	* *
Relief from Judgment under Rule 60 (b)(6) and request to Amend Complaint	*

3/02/93 (SIGNED) Jaime Pieras

/_/ U.S. District Judge /_/ U.S. Magistrate

APPENDIX F-1

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

MANUEL GONZALEZ, et al.

v.
HON. RAFAEL HERNANDEZ COLON, et al.

CASE NO. CV 92-1972 (JP)
ORDER

MOTION	RULING
Date : Filed: 3/15/93 Docket #41	* DENIED. The case is * closed. The Court
(x) Plffs ( ) Defts	* cautions the plaintiffs * not to abuse
( ) Other	* the procedures of * Rules 59 and 60.
Title: Motion for	* *
Reconsideration of Last	* *
Decision Issued and Entered	* *
by the Honorable Court	* *

4/19/93 (SIGNED) Jaime Pieras

/_/ U.S. District Judge /_/ U.S. Magistrate

APPENDIX G-1

FILE APPEAL
CLOSED

U.S. District Court
Puerto Rico (San Juan)

CIVIL DOCKET fOR CASE #: 92-CV-1972

Acevedo-Villalobos, et al v. Hernández Colón, et al

Assigned to: Judge Jaime Pierras Jr. File:07/15/92

Demand: $23,000,000 Nature of Suit: 442

Lead Docket: None Jurisdiction: Federal Question

Dkt # other court: None Jury demand: Plaintiff

Cause: 42:1983 Civil Rights Act

* * *

FILE APPEAL

CLOSED

Proceedings include ali events.

3:92cv1972 Acevedo-Villalobos, et al v. Hernández-Colón, et al.

7/15/92 1 COMPLAINT w/attachs. Filing Fee $120.00 Receipt #63344 (ma) [Entry

date 08/04/92]

* * *

10/27/92 11 MOTION with Memorandum in Support by Refael Hernández Colón, Hermenegildo Ortíz-Quiñonez, Norma Pérez-Giraud, Rosaura González-Rucci, Reinaldo Hernández-Berrios, Manuel López-Rodríguez, Antonio Santiago-Vázquez to Dismiss, and/or for Summary Judgment. Response due 11/9/92. (su) [Entry date 10/28/92]

10/27/92 12 MOTION by Rafael Hernández-Colón, Hermenegildo Ortíz-Quiñonez, Norma Pérez-Giraud, Rosaura González-Rucci, Reinaldo Hernández-Berrios, Manuel López-Rodríguez, Antonio Santiago-

Vázquez to accept Spanish Language Documents exhibits C, D & G and consider it as such the sole purposes of the mot req dismissal (su) [Entry date 10/28/92].

10/29/92 13 ANSWER to Complaint by Federal defendants (su) [Entry date 10/30/92]

10/29/92 14 MOTION by ELA defendants to Stay discovery proceedings until mot to dismiss is adjudicated. Responde due 11/12/92 (su) [Entry date 10/30/92]

* * *

1/11/93 25 MOTION with Memorandum in Support by USA to Dismiss with attachments. Response due 1/25/93. (ni) [Entry date

01/13/93]

1/11/93 26 MOTION SUBMITTING Slip Opinion from CCA from another case, w/attch. by pall (ni) [Entry date 01/13/93]

1/15/93 27 OPINION AND ORDER granting [11-1] motion to Dismiss, etc as stated herein. (signed by Judge Jaime Pieras Jr.) (ni) [Entry date 01/19/93]

1/15/93 28 JUDGMENT pursuant to O & O entered this date, the complaint is hereby dismissed. (signed by Judge Jaime Pieras Jr.) (ni) [Entry date 01/19/93]

1/15/93 -- Case closed (ni) [Entry date 01/19/93]

1/19/93 -- CASE sent to closed file on 1/19/93. (ni)

1/20/93 29 MOTION by pall to Extend Time until 2/16/93 to respond to defts mot to dismiss (il) [Entry date 01/21/93/

1/21/93 -- CASE REFERRED TO JUDGE. (il)

2/1/93 30 MOTION, by Petra Cruz-Jimenez to Accept Spanish Language Documents (su) [Entry date 02/03/93]

2/1/93 31 MOTION, by all plaintiffs for REconsideration of [28-1] judgment order, and/or to Amend [1-1] complaint. Response due 2/15/93. (su) [Entry date 02/03/93]

2/12/93 32 MOTION by pall for Reconsideration of [28-1] judgment order SUPPLEMENTAL refering to: [31-1] motion for Reconsideration of [28-1] judgment order w/attachs. (il) [Entry date 02/17/93]

2/17/93 33 MOTION by Regino Colon-Nieves to

Extend Time for 20 days to translate into English Local Laws 58 & 66 (su) [Entry date 02/18/93

2/19/93 34 MOTION by ELA defendants to Extend Time to 10 days to tender oppos to pltfs supplemental argument to defts mot for reconsideration (il) [Entry date 02/22/93]

2/26/93 35 RESPONSE by Federal defendants in opposition to [31-1] motion for Reconsideration of [28-1] judgment order, [31-2] motion to Amend [1-1] complaint (su) [Entry date 03/01/93

3/3/93 36 MOTION SUBMITTING certified English translation of Local Law 58 of 8/9/91 by pall w/attachs. (il) [Entry

date 03/04/93] [Edit date 03/17/93]

/3/93 37 ORDER mooting [30-1] motion to Accept Spanish Language Documents, mooting [29-1] motion to Extend Time until 2/16/93 to respond to defts mot to dismiss (signed by Judge Jaime Pieras Jr.) (il) [entry date 03/04/93]

3/3/93 38 ORDER granting [33-1] motion to Extend time for 20 days to translate into English Local Laws 58 & 66, mooting [32-1] supplemental motion for Reconsideration of [28-1] judgment order SUPPLEMENTAL (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/04/93]

3/3/93 39 ORDER denying [31-1] motion for

		Reconsideration of [28-1] judgment order, denying [31-2] motion to Amend [1-1] complaint (signed by Judge Jaime Pieras Jr). (il) [Entry date 03/09/93]
3/8/93	40	ORDER [36-1] miscellaneous Noted. (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/09/93]
3/9/93	--	CASE REFERRED TO JUDGE .(il)
3/15/93	41	MOTION by all pla for Reconsideration of [39-1] order w/attachs in support thereof (il) [entry date 03/17/93
4/21/93	42	ORDER denying [41-1] motion or Reconsideration of [39-1] order, etc., as stated herein. (signed by Judge Jaime Pieras Jr.) (il) [Entry date

04/22/93]

4/22/93	--	CASE sent to closed file on 4/22/93. (il)
5/14/93	43	NOTICE OF APPEAL by all pla. FILING FEE $105. RECEIPT #67217 Transcript Order Form furnished to appellant. Appeal record due on 5/24/93 (il) [Entry date 05/17/93]

APPENDIX H-1

OTHER STATUTORY PROVISION INVOLVED

1- Rule 58 of the Federal Rules of Civil Procedures states in relevant part: "Subject to the provisions of Rule 54 (b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief,... the court shall promptly approve the form of the judgment, and the clerk shall there upon enter it. Every judgment shall be set forth on a separate document...."

2. Rule 54 (a) of the Fed. R. Civ. P. states in relevant part: ""Judgment" as used in these rules includes a decree and any order from which an appeal lies...."

3. Rule 54 (b) of the Fed. R. Civ. P. states in relevant

part: "When more than one claim... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties... In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

4. Rule 54 (c) of the Fed. R. Civ. P. states in relevant part that "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief

in the party's pleadings".

5. Rule 15 (a) of the Fed. R. Civ. P. states in relevant part: "(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or,...Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...."

6. Rule 3 of the Federal Rules of Appellate Procedure states in relevant part (this rule was amended effective on December 1, 1993): "(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4...."

7. Rule 4 of the Federal Rules of Appellate Procedure states in relevant part (this rule was amended effective on

December 1, 1993): "(a) Appeals in Civil Cases. (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry...."

APPENDIX I-1

IN THE
SUPREME COURT OF THE UNITED STATES

NORMA I. ACEVEDO-VILLALOBOS, an the other petitioners identified below, which are made an integral part of the caption of this case, Petitioners

vs.

HON. RAFAEL HERNANDEZ, et al., Respondents

LIST AND IDENTIFICATION OF PETITIONERS

AVP-1	Acevedo	Villalobos	Norma I.	582-88-8774
AVP-2	Acevedo	Muñiz	William	582-86-3287
AVP-3	Alejandro		Heddy E.	062-34-0066
AVP-4	Allende	Bravo	María S.	580-26-3433
AVP-5	Arroyo	Bula	Gladys	584-07-1031
AVP-6	Ayala	Reguero	Ramón A.	581-17-4791
AVP-7	Badillo	Blas	Patricio	584-01-9521
AVP-8	Baez	Puras	Rafael	584-12-0561
AVP-9	Beauchamp	Díaz	Alba D.	584-01-5252
AVP-10	Benítez	Rodríguez	Juan A.	584-30-3724
AVP-11	Benítez	Colón	María J.	582-64-8974
AVP-12	Berrios	Robles	Wilma	584-70-0796
AVP-13	Betancourt	Márquez	Aida	
AVP-14	Blazquez	Soto	Manuel	584-36-1241
AVP-15	Bonano	Morell	Miguel A.	582-98-1159
AVP-16	Cabán	Ortíz	Freyte	055-48-6160
AVP-17	Cardona	Cardona	Lygia	584-10-7494
AVP-18	Cartagena	Morales	Ana Ruth	580-96-4036
AVP-19	Casanove	Santiago	Andres	582-82-9560
AVP-20	Cepeda	Vázquez	Hilda	580-56-4266

APPENDIX I-2

AVP-21	Cintrón	Rodríguez	Jaime	584-36-2614
AVP-22	Cintrón	Silva	Cesar Luis	581-25-7742
AVP-23	Colón	Anglada	José	584-26-3646
AVP-24	Colón	Nieves	Regino	584-56-1831
AVP-25	Colón	Negrón	Myrta	583-36-8929
AVP-26	Cruz	Prado	Francisco	582-64-9620
AVP-27	Cruz	Rivera	Linda E.	582-49-9021
AVP-28	Cruz	Jiménez	Petra	581-44-4144
AVP-29	Curet	Pérez	Nelly	584-07-1608
AVP-30	De Armas	Figueroa	Juan	584-64-6195
AVP-31	De Jesús	Meléndez	Rafael	581-74-2042
AVP-32	De Jesús		María Julia	583-12-8441
AVP-33	De León	De León	Lydia Raquel	583-32-1726
AVP-34	Delgado	Amaro	Pablo	584-49-1380
AVP-35	Díaz	Rosado	Edwin	583-19-1603
AVP-36	Díaz	Olmeda	Tomás	584-86-4728
AVP-37	Díaz	Rivera	Carmen M.	582-98-3936
AVP-38	Díaz	Hernández	Jaime	062-26-6860
AVP-40	Escalante		Miguel A.	584-24-9533
AVP-41	Felicier	De La Cruz	Rosario	583-40-0152
AVP-42	Feliciano	Freites	Elizabeth	584-17-4520
AVP-43	Felicianc	Rodríguez	Quino	114-30-6453
AVP-44	Figueroa	Alvarado	Rosa	584-62-9837
AVP-45	Figueroa	Cruz	Gladys	582-41-5864
AVP-46	Forestier		Florencio	550-48-3303
AVP-47	Galarza	Irizarry	Antonia	583-07-2726
AVP-48	García	Galarza	Gabriel	584-03-5403
AVP-49	García	Serrano	Eladio	580-66-0921
AVP-50	García	Loubriel	Julio	583-26-5735
AVP-51	García	Bermúdez	María H.	584-32-9020
AVP-52	García	Gracia	Edwin	584-64-7942
AVP-53	García	Parrilla	Roberto	580-07-3719
AVP-54	García	Gil	Antonio	584-76-6461
AVP-55	García	Maldonado	Víctor H.	130-36-3703
AVP-56	González	Figueroa	Manuel	580-98-2278
AVP-57	González	Camacho	Monserrate	582-90-7365
AVP-58	González	Rivera	Lillian	584-12-5596
AVP-59	González	Castro	Carmen Elsa	583-48-7362
AVP-60	González	Domínguez	Sonia	584-74-5503
AVP-61	González	Ríos	Ramón A.	583-84-7894

APPENDIX I-3

AVP-62	Green	Tricoche	Mitchell	581-17-5579
AVP-63	Guzmán	Martínez	Myrna	584-76-4155
AVP-64	Hernández	Guzmán	José M.	581-94-5035
AVP-65	Irizarry	Burgos	Manuel	582-74-6085
AVP-66	Jackson	Pizarro	Neil	583-52-0151
AVP-67	Labiosa	Miranda	Inés	584-34-3926
AVP-68	López	Torres	José Orlando	583-76-8532
AVP-69	López	Irizarry	Eva	584-18-9871
AVP-70	López	Sepulveda	Enid	584-08-4146
AVP-71	López	Valentín	Zenaida	583-24-5537
AVP-72	Luiggi	Calcerrada	Eduardo	581-98-0497
AVP-73	Luzunaris	Martínez	José	584-34-7785
AVP-74	Maldonado	Delgado	Wilfredo	583-66-7798
AVP-75	Mangual	Ramírez	Elsa L.	580-90-5324
AVP-76	Marín	García	Roberto	584-30-0244
AVP-77	Martínez	Molina	José I.	582-26-1381
AVP-78	Martínez	Vega	Dinelia	582-13-2350
AVP-79	Martínez	Vázquez	Rosalina	583-36-3837
AVP-80	Martínez	García	Elizabeth	584-74-8491
AVP-81	Martínez	García	Juana	583-66-2539
AVP-82	Martínez	Arzola	Robinson	581-84-4899
AVP-83	Martínez	Rosario	Ana I.	583-16-8314
AVP-84	Martínez	Nazario	Rubén	583-18-7035
AVP-85	Matos	Del Toro	Lydia E.	584-57-2830
AVP-86	Medina	Lugo	Santa	583-24-5225
AVP-87	Medina	Ruíz	Dionisio	583-57-9513
AVP-88	Meléndez	Castro	Dandy	583-01-5451
AVP-89	Meléndez	Arroyo	Alicia	584-64-4919
AVP-90	Meléndez	Ramos	Matilde	583-46-5272
AVP-91	Meléndez	Parrilla	Luis A.	584-56-4169
AVP-92	Meléndez	Cuadrado	Mario	581-08-5265
AVP-93	Méndez	Pérez	Ana Sylvia	582-27-1380
AVP-94	Mercado	Parsons	Migdalia	583-38-1962
AVP-95	Miranda	de Figueroa	Olga	581-52-9430
AVP-96	Miranda	Rodríguez	Justino	582-82-3853
AVP-97	Molina	De la Rosa	José L.	583-12-1981
AVP-98	Monge	Jiménez	Carlos E.	584-42-4463
AVP-99	Montanez	Pérez	Maria E.	584-80-0891
AVP-100	Mora	Siverio	Carmen G.	581-64-7895
AVP-101	Morales	Cintrón	Bernardo	581-94-5465

APPENDIX I-4

AVP-102	Morales	Galarza	Luz María	584-68-8823
AVP-103	Morales	García	José M.	584-84-2094
AVP-104	Navarro	Cordero	Naida	581-50-4378
AVP-105	Nazario	Sepulveda	Julio	580-48-3331
AVP-106	Negrón	Cucurella	María C.	584-07-6171
AVP-107	Nieves	Rodríguez	José Luis	581-50-9077
AVP-108	Nieves	Ruíz	Angel M.	580-24-6111
AVP-109	Oliver	Frias	Jaime F.	584-10-9476
AVP-110	Olmeda	Borrero	Angel M.	581-92-47216
AVP-111	Oquendo	Garcet	José A.	582-58-6988
AVP-112	Ortega	Candelario	Julio	583-60-4850
AVP-113	Ortíz	Dones	Flor	581-16-5132
AVP-114	Ortíz	Sánchez	Juan A.	583-39-3761
AVP-115	Ortíz	Delgado	Alma	584-42-9921
AVP-116	Ortíz	Santana	Mary Luz	584-76-3945
AVP-117	Otero	Colón	Juan F.	580-98-8037
AVP-118	Pabón	Parrilla	María Luisa	582-50-5873
AVP-119	Pagán	Morales	Dolly	
AVP-120	Pardo	Brea	Alfredo	100-26-9725
AVP-121	Pares	Valle	Lillian	581-98-1295
AVP-122	Parrilla	Conde	María	581-80-5091
AVP-123	Pérez	Pitre	Rosa	582-88-7418
AVP-124	Pérez	Flores	Carmen R.	582-80-8914
AVP-125	Pérez	Reyes	Gloria C.	584-16-2960
AVP-126	Pérez	Ortíz	Andrés	584-64-0410
AVP-127	Pérez	Ortíz	Andrés	
AVP-128	Pérez	Hernández	Gladys E.	584-56-0983
AVP-129	Pérez	Díaz	Eneida	
AVP-130	Quiñonez	Hernández	Eduardo	581-22-0311
AVP-131	Quiñonez	Rivera	Olga	584-86-2634
AVP-132	Quiñonez	Marrero	Valentín	580-40-0747
AVP-133	Ramírez	Esquilín	Loyda L.	584-84-4330
AVP-134	Ramírez	Basbot	Rosa	581-76-9433
AVP-135	Ramos	de Rosaly	Angela	583-28-1884
AVP-136	Ramos	Martínez	Luis A.	584-28-1096
AVP-137	Ramos	Rodríguez	Lilliam	131-26-0814
AVP-138	Ramos	Rodríguez	José A.	581-94-9029
AVP-139	Rentas	Hernández	Josué	582-66-5613
AVP-140	Resto	Ortíz	Lillian I.	584-48-2678

APPENDIX I-5

AVP-141	Rios	Febres	Saturnino	582-21-1018
AVP-142	Rios	Ayala	Julio	584-76-5513
AVP-143	Rios	Cruz	Norma	584-09-2115
AVP-144	Rivera	Vélez	Edwin	
AVP-145	Rivera	Cruz	Brigido	580-82-8128
AVP-146	Rivera	Rivera	Ivelisse	582-45-2515
AVP-147	Rivera	Torres	Lydia M.	
AVP-148	Rivera	Santiago	Sandra M.	583-90-9855
AVP-149	Rivera	Santiago	María	584-14-7607
AVP-150	Rivera	Rivera	Saulo	580-98-4596
AVP-151	Rivera	García	María	583-09-6811
AVP-152	Rivera	Cruz	Dahlma I.	583-07-7779
AVP-153	Rivera	Serrano	Olga E.	
AVP-154	Rivera	Ranib	José I.	582-17-4270
AVP-155	Rivera	Rivera	Diana	584-90-9371
AVP-156	Rivera	Malpica	Rómulo	
AVP-157	Rivera	García	José A.	580-58-9458
AVP-158	Rodríguez	Otero	Gilberto	580-70-2955
AVP-159	Rodríguez	Quiles	Hilario	581-44-3743
AVP-160	Rodríguez	Torres	Doel	583-82-1399
AVP-161	Rodríguez	Morales	Yolanda	
AVP-162	Rodríguez	Mojica	Ramón	580-82-8869
AVP-163	Rodríguez	Rodriguez	Sulmeneida	584-56-4366
AVP-164	Rodríguez	Ramos	Ramón L.	
AVP-165	Rodríguez	Ojeda	Francisco	
AVP-166	Rodríguez		Héctor	
AVP-167	Rodríguez	Torres	Tomasita	582-96-0802
AVP-168	Rodríguez	Prado	Ana J.	
AVP-169	Rodríguez	Dominguez	Awilda	583-07-9884
AVP-170	Rodríguez	Bonilla	Rosa A.	584-01-7381
AVP-171	Rodríguez	Valentín	Haydee	581-98-2029
AVP-172	Roman	Astacio	Eliezer	581-98-8616
AVP-173	Roman	Cortes	Maria E.	580-56-1363
AVP-174	Roman	Ortíz	Rosa	580-58-4964
AVP-175	Romero	Alicea	Miriam I.	583-24-1957
AVP-176	Ronda	Ramírez	Magaly	583-42-7992
AVP-177	Rosa	Mojica	Eugenio	581-40-3668
AVP-178	Rosa	Ramos	Eva	582-72-4998
AVP-179	Rosado	Moulier	Elba	582-41-9288
AVP-180	Rosado	Virella	Angel L.	582-07-6296

APPENDIX I-6

AVP-181	Rosario	Marcial	Aida I.	065-36-1619
AVP-182	Ruiz	Morales	Gilberto	584-47-0696
AVP-183	Ruiz	Dávila	Trudon	580-62-3583
AVP-184	Ruiz	de Osorio	Irma E.	584-32-7203
AVP-185	Ruiz	García	Juana	580-76-7025
AVP-186	Salas	Rosa	Ydsia	583-19-6439
AVP-187	Salgado	González	Luz	583-10-1670
AVP-188	Sánchez	Figueroa	Diana I.	584-86-2735
AVP-189	Sanfeliz	Ortíz	Portalina	581-16-5164
AVP-190	Santiago	Carillas	María	581-58-9327
AVP-191	Santiago	González	Guillermo	580-64-2867
AVP-192	Santiago	Del Valle	Manuel A.	582-54-1377
AVP-193	Santiago	Meléndez	María A.	583-20-0348
AVP-194	Santiago	Cotto	Jacinta	581-78-8523
AVP-195	Santos	Rosado	Ada R.	583-38-7549
AVP-196	Sosa	Miussender	Ada Ruth	583-01-6702
AVP-197	Soto	García	Eleuteria	584-60-7927
AVP-198	Soto	Morales	María V.	
AVP-199	Sotomayor	Cacho	Luzzette M.	584-34-9303
AVP-200	Stolle	Carrasquillo	Alberto	583-66-8047
AVP-201	Torrens	Mercado	Manuel	582-05-2073
AVP-202	Torres	Rodríguez	Carlos M.	581-66-9310
AVP-203	Torres	Buzo	Margarita	580-90-3982
AVP-204	Torres	López	Luis R.	582-70-0451
AVP-205	Torres	Calaff	María E.	584-40-6952
AVP-206	Torres	Ramos	Margarita	580-90-3982
AVP-207	Torres	Rodríguez	Luisa	581-02-9417
AVP-208	Trinidad	Ramos	Josefina	584-13-3910
AVP-209	Trinidad	Rosa	Dolores	582-96-6020
AVP-210	Troche	Rodríguez	Juan P.	582-42-1297
AVP-211	Vargas	Rivera	Felix	580-80-5081
AVP-212	Vargas	Burgos	Pedro	582-88-2778
AVP-213	Vázquez	Martínez	Nereida	583-66-2538
AVP-214	Vera		Paulita	122-32-4788
AVP-215	Vélez	Ruiz	Edwin	582-82-3178
AVP-216	Vélez	Pérez	Providencia	581-19-7668
AVP-217	Velez	Delgado	Octavio	073-24-8363
AVP-218	Vicente	Carbonell	Rosa M.	581-82-0446
AVP-219	Vicenty	Martinez	Ramon	584-09-6557
AVP-220	Villafane	Acosta	Pedro	582-64-5179

AVP-222	Frances	Martínez	Samuel	581-66-9583
AVP-221	Davila	Cid	Samuel G.	583-38-6439
AVP-223	Diaz	Flores	Eusebio	584-54-2531
AVP-224	Brown		Cristina I.	078-32-4506
AVP-225	Rodriguez	Alvarado	Nancy	061-32-6934
AVP-226	Galan	Torres	Maria M.	584-38-4407
AVP-227	Fuentes	Colon	Dolores	583-12-1124
AVP-228	Oliver	Noriega	Eduardo	584-76-2398
AVP-229	Llorens	Ubarri	Sandy	583-88-9702

LIST OF INTERVENOR-PETITIONERS

AVP-230	Sotomayor	Rios	Gladys Mabel	583-51-2235
AVP-231	Rivera	Medina	Faustino	581-52-1117
AVP-232	Cherena	Quiles	Luis M.	581-76-4468
AVP-233	Figueroa	Perales	Justo	580-60-4764
AVP-234	Berrios	Morales	Felez R.	582-52-1776
AVP-235	Rivera	Alcázar	Gladys	582-11-8810
AVP-236	Segarra	Camacho	Santos	584-09-7387
AVP-237	Melendez	De Jesus	Ismael	584-03-0532
AVP-238	Perez	Pillot	Diego	582-56-5955
AVP-239	Leon	Rodríguez	José	583-46-3849
AVP-240	Castro	Ramos	Migdalia	583-96-1510
AVP-241	Martínez	Dauo	Juan E.	583-78-8098
AVP-242	Figueroa	Valle	Antonio E.	105-22-0077
AVP-243	Figueroa	Soto	Angel Luis	582-92-7405
AVP-244	Rivera	González	Antonio	581-70-4882
AVP-245	Rodríguez	Torres	Angel M.	584-50-4503
AVP-246	Rivera	Lozano	Rafael	584-78-7441
AVP-247	Vazquez	Lozano	Carmen M.	582-94-6524
AVP-248	Sotomayor	Rios	Gladys Mabel	583-51-2285
AVP-249	Rivera	Cruz	Brigido	580-82-8128
AVP-250	Laboy	Cosme	Angel Luis	581-50-6179
AVP-251	Pizarro	Romero	Jesús	580-40-2484
AVP-252	Orozco	Soler	María T.	583-52-6104
AVP-253	Santana	Laureano	Virginia	582-42-5028
AVP-254	Rodríguez	Díaz	Hilda A.	581-80-5132
AVP-255	Escalera	Cruz	Dimari	582-13-1489
AVP-256	Tapia	Ramos	Ramonita	584-54-2769
AVP-257	Calderon	Rodríguez	Sandra E.	584-52-5403

AVP-258	Guivas	Arvelo	Myrta I.	071-34-8487
AVP-259	Lopez	Martínez	Mayra	582-21-4604
AVP-260	Rodríguez	Amaro	Roberto	583-13-0985
AVP-261	Rodríguez	Pérez	Confesor	582-96-3254
AVP-262	Carlo	Cordero	Ferdinand O.	583-17-6386
AVP-263	Cancel	Soto	Gladys	581-62-1687
AVP-264	Pérez	Ramírez	Naida S.	581-14-6231
AVP-265	Trabal	Alicea	Alberto	582-39-0818
AVP-266	Lorenzo	Colombani	Norma I.	583-66-1708
AVP-267	Otero	Loubriel	Migdalia	583-68-9860
AVP-268	Silva	Maysonet	Manuel	093-28-1955
AVP-269	Suarez	Matos	Edwin	584-92-3624
AVP-270	Hernández	Martínez	Domingo	580-88-2750
AVP-271	Gual	Alicea	Carlos A.	584-56-0735
AVP-272	Cruz	Cosme	Maximo	583-84-0074
AVP-273	Rivera	Rodríguez	Eva H.	583-32-0625
AVP-274	Ramos	Velazco	Aida Rosa	584-13-5321
AVP-275	Otero	Díaz	Lourdes	079-36-6068
AVP-276	Sánchez	Pérez	William	583-68-4608
AVP-277	Portela	Roman	María del C.	583-68-8307
AVP-278	Ortiz	Berrios	Federico	580-98-9867
AVP-279	Marcado	Rosso	Roberto	581-42-4491
AVP-280	Díaz	Flores	Eusebio	584-54-2531
AVP-281	Rodríguez	Cedres	Carmen J.	580-44-6337
AVP-282	Frances	Martinez	Samuel	581-66-9583
AVP-283	Berrios	Rivera	María H.	580-66-5252
AVP-284	Felton	Plaza	Manuel	582-74-6085
AVP-285	Castro	Matos	Luis Ramón	583-24-4298
AVP-286	Santa	Pagán	Ramón	582-80-1278
AVP-287	Landrón	Pabón	Francisco	580-58-5484
AVP-288	Pantoja	Martinez	Donato	582-16-6317
AVP-289	Cádiz	Rosario	Federico	080-30-3939
AVP-290	Ramos	Albelo	Miguel	581-20-0117
AVP-291	Lozada	Ortíz	Héctor M.	584-40-8297
AVP-292	Vega	Benítez	Andres	584-34-9037
AVP-293	Rexach	Medina	Myrna M.	580-74-5026
AVP-294	Adorno	García	Bienvenida	584-38-0995
AVP-295	Aponte	Jiménez	Ana E.	580-88-3885
AVP-296	Diaz	Rexach	Isabel C.	584-57-3485
AVP-297	Díaz	López	David F.	583-03-3416

is that it produces unfair and unjust results. We believe that under the mayority view adopted by the Seventh, Ninth, Sixth, Tenth and Third Circuits, a different result would have emerged and petitioners appeal would have been heard and decided on the merits. For example, assuming petitioners would have filed their original complaint in a district court within the jurisdictional area of the Seventh Circuit, and assuming that said district court dismissed the complaint without expressly dismissing the causes of actions, and where the causes of actions could be saved by amendment, the Seventh Circuit-- as well as the Ninth, Sixth, Third and Tenth-- would have determined that it had jurisdiction to entertain petitioner's appeal on the merits. Under the federal law rulings reaffirmed in **Paganis v. Blonstein**, 3 F3d 1067 (7th Cir. **1993**), petitioner's appeal would have been heard and decided on the merits. The rulings on federal law in **Paganis**, supra, 3 F3d at 1068-1073 (1993),

accords entirely and exactly to this Honorable Court's holding (and to the reasoning underlying this Court holding)[9] in **Jung v. K and D Mining Co**., 356 US 335, 337 (1958) which interpreted Rule 58 of the Fed. R. Civ. P. In addition, under the intermediate approach taken by the Eleventh and Fifth Circuits, petitioners appeal would have been also entertained and decided on the merits.

This case presents two (2) other conflicting holdings among various courts of appeals. The decision of the First Circuit below states that the rationale underlying a district court's dismissal of the complaint without dismissing the causes of actions, is that a plaintiff has a right to amend the complaint once as a matter of course under Rule 15 (a) of the Fed. R. Civ. P. (App., infra A-15

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[9] **In United States v. Doe, 465 US 605, 610 (1984), this Honorable Court granted certiorari "to resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding in Fisher"**

to A-20). The decision below acknowledged a split conflict on this issue between the courts of appeals. (App., infra, A-16 to A-17). The Second, Eight and First Circuits has adopted the view that a plaintiffs right to amend once as a matter of course terminates upon the granting of the motion to dismis. (App., infra A-20 to A-21). There are at least three (3) Circuits that have held that even after the district court's dismissal of the complaint, without expressly dismissing the underlying actions, a plaintiff has a right to amend the complaint once as a matter of course **if the defendant has not filed its responsive pleading**. See **Paganis v. Blonstein**, 3 F3d 1067, 1072 (7th Cir. 1993), **Car Carriers, Inc. v. Ford Motor Co.**, 745 F2d 1101, 1111 (7th Cir. 1984); **Ohio Cas. Ins. Co. v. Farmers Bank**, 178 F2d 570 (6th Cir. 1949); **Smith v. California**, 336 F2d 530 (9th Cir. 1964), **Allen v. Veterans Administration**, 749 F2d 1386, 1388 (9th Cir. 1984), **Scanlon v. Atasca-**

dero State Hospital, 677 F2d 1271, 1272 (9th Cir. 1982). If this approach taken by the Seventh, Ninth and Sixth Circuits would have been adopted by the First Circuit's decision below, petitioners' appeal would have been entertained by the First Circuit, because the January 15, 1993 Opinion and Order and separate judgment was not a final decision under sec. 1291 since petitioners had a right to amend once as a matter of course because the state defendants had not answered the complaint. In **Jung**, supra, however, one of the main questions was whether a district court's Order which only dismissed **a first amended complaint** granting leave to amend the complaint, and a district court additional Order which granted additional leave to file an amended complaint within 22 days, directed that all relief be denied as required by Rule 58 of the Fed. R. Civ. P., and therefore represented the final decision in the case under 28 USC 1291. See **Jung**, supra, 356 US at 336. Therefore, an

additional rationale underlying a district court's dismissal of a complaint without dismissing the causes of actions, turns on the question if whether in a multiple parties and claims lawsuit, a district court's Opinion and Order and separate document judgment (both dated and issued on the same day) which dismissed only the complaint, **directed that all relief be denied as to all the parties and all the claims**, as required by Rule 58, and therefore represented the final decision in the case under 28 USC 1291. It also turns on the question if whether the complaint's causes of actions could have been cured and saved by leave to amend with permission of the district court under Rule 15 (a) of the Fed. R. Civ. P., where the district court's Opinion and Order implicitly invited petitioners to file their first amended complaint, and where the dismissal of the complaint was grounded on the insufficiency of the statements of facts as to who did what to whom and why.

The decision below sought to be reviewed creates an additional conflict between various courts of appeals. The First Circuit's decision concluded that petitioner's compiaint does not contain a multiple parties and claims lawsuit, and that therefore the requirements of Rule 54 (b) of the Fed. R. Civ. P. were not implicated in this case because "[t]he district court unmistakably intended to dismiss the complaint **in toto**,....Its opinion and order is most reasonably read as having dismissed the entire complaint even though it adverts only to the motion to dismiss filed by state defendants. Furthermore, the final judgment itself expressly dismissed "the plaintiffs' complaint" after the federal defendants had filed their own motion to dismiss shortly before the district court entered its opinion and final judgmerit...." (App., infra, A-11,; see footnote 3 of the decision below). This appraisal of the district court judge's mind and intention is clear and present subjectivism which is contrary to a scientifical

approach to judicial review.

The above ruling made by the First Circuit is in square conflict with other courts of appeal's holdings on the same matter of federal law under Rule 54 (b) of the Fed. R. Civ. P. (App., infra, H-1, H-2). See **Richardson v. United States,** 336 F2d 265, 266 (9th Cir. 1964). ("**The second count, against Don's was not affected.** It remained pending and at issue. In such a case, unless the court makes the determination provided for in Rule 54 (b), F. R. Civ. P., **its order dismissing, as to only one party**, even though it dismisses the action (as distinguished from the complaint), **is not appealable as a final decision under 28 USC sec. 1291** (**Russell v. Cunningham**, 9 Cir., 1960, 279 F2d 797, 805..." (Underlying ours). See also **Brower v. Inyo County**, 817 F2d 540, 542 (9th Cir. 1987) ("**In an action involving multiple defendants, the dismissal of the complaint only, without dismissal of the action, is not a final judgment.**") (Emphasis

ours); See also **Willhelm v. Eastern Airlines, Inc.**, 927 F2d 971, 973 (7th Cir. 1991); and **Atwater v. North American Coal Corp.**, 111 F2d 125 (2d Cir. 1940), this case was cited with approval by the Second Circuit in **Weisman**, supra, which in turn was cited with approval by the First Circuit's decision below. (App., infra A-15).

Respectfully, we implore and pray this Honorable Court to review and resolve the foregoing square and real conflicts on very important live issues of federal law.

2. **The Questions Presented Are Important**

Honorable Justice Scalia has stated that "[w]e have said elsewhere that "[t]he considerations that **determine finality** are not abstractions but have reference to very real interest-not merely those of the immediate parties, but, more particularly, **those that pertain to the smooth functioning of our judicial system.**" **Republic Natural Gas Co. v. Oklahoma**, 334 US 62, 69 (1948)..."(Emphasis ours) See **Budinich v. Becton Dickinson,** 486 US

196, 201-202 (1988).

Honorable Justice O'Connor has indicated that "**[t]he final judgment rule** serves several important interests....**It is crucial to the efficient administration of justice. Firestone Tire and Rubber Co. v. Risjord**, supra, at 374..." (Emphasis ours). See **Flanagan v. United States,** 465 US 259, 263-264 (1984).

Distinguished commentators have stated that "[o]n the Supreme Court rests the prime responsability for the proper functioning of the federal judiciary. **The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflect that responsability. Such cases qualify for review by reason of their importance, novelty, or difficulty, with a conflict of decisions also playing a significant role**." See Stern, Gressman, Snapiro, and Geller, Supreme Court Practice, section 4.15, pages 191-192, (7th. ed. 1993). The finality rule under 28 USC 1291 "**define vitally important**

aspects of our court structure". See 15A Wright, supra, section 3907, page 269 (2d ed. 1993).

The questions presented in this petition are very important issues of federal appellate jurisdiction under 28 USC 1291 and federal practice and procedure (Rules 58, 54(b) and 15 (a) of the Fed. R. Civ. P.). Therefore, the solution of these questions pertain to the smooth functioning of the federal judicial system, and will be crucial to the efficient administration of justice within the federal judicial structure. See **Sears, Roebuck and Co, v. Mackey** 351 US 427, 429 (1956) ("Because of the importance of the issue in determining appellate jurisdiction and because of a conflict of judicial views on the subject, we granted certiorari"). Moreover, this petition presents the question of whether the court of appeals below applied the correct legal standards for review in cases where the district court dismissed only the complaint. The resolution of this question will provide a

single uniform federal law standard affording guidance to all the courts of appeals and thus contributing to the efficiency of the federal court structure.

3. **The Decision of the Court of Appeals is Contrary to Supreme Court Decisions**

A. **The Court of Appeals Standards for Review Employed in this Case.**

The decision of the court of appeals below used as a controlling and decisive factor, in determining whether a dismissal of the complaint constitutes a final decision under 28 USC 1291, the mere fact that the district court issued a separate document judgment (App., infra, A-20 to A-22), although this Honorable Court has held that the separate document judgment is not a prerequisite to appellate jurisdiction under 28 USC 1291. See **Bankers Trust Co.**, 435 US at 382 and 383. The decision in this case failed to evaluate properly the six page Opinion and Order issued by the district court (App., infra, A-12 to A-23). **The Opinion and Order concluded that some**

causes of actions included in the original complaint lacked sufficient statements of facts as to who did what to whom and why, but failed to consider and evaluate one (1) of the causes of actions alleged in the complaint. The court of appeals only made a conslusory statement, without explanation and discussion, regarding the district court's Opinion and Order while referring to the Rule 54 (b) issue in this case (see footnote 3 of the court of appeals decision, at App. infra, A-11). But with respect to the main issue in this case (the dismissal of the complaint), **the court of appeals below did not make reference at all to the district court's Opinion and Order** (App., infra, A-12 to A-23).

The above stated standards for review employed by the First Circuit is contrary to this Honorable Court's holding in **Bankers Trust Co. v. Mallis**, 435 US 381, 385, 386 (1978), **United States v. Hark**, 320 US 531 (1944) and **U.S. v. Schaefer Brewing Co.**, 356 US 227 (1958).

In **Bankers Trust Co.**, supra, 435 US at 385 and 386, footnote 6, this Honorable Court held that "[n]or would strict compliance with the separate-judgment requirements **aid in the court of appeals' determination of whether the decision of the District Court was "final" for purpose of sec. 1291. Even if a separate judgment is filed, the court of appeals must still determine whether the district court intended the judgment to represent the final decision in the case. Cf. United States v. Hark,** 320 US 531 (1944)." (Emphasis added). In **U.S. v. Schaefer Brewing Co**., supra, 356 US, at 235 and 236, this Honorable Court assessed the actions of all concerned in the suit (the judge's, the district court clerk, and the parties counsel) in order to determine whether the district court intended the judgment to represent the final decision in the case.

The previously stated holdings in **Bankers Trust Co,** supra, **United States v. Hark**, supra, and **United States**

v. Schaefer Brewing Co., supra, has not been modified or revoked by this Honorable Court, thus this Courts' ruling remain authoritative law. Therefore, the court of appeals decision below erred in applying the correct legal standards for review, when it failed to consider properly and discuss the contents of the district court record and the Opinion and Order in determining whether the district court intended the separate document judgment to represent the final decision in the case pursuant to 28 USC 1291.

B. The Court of Appeals Decision is Contrary to Supreme Court Holdings on the Same Matter

In **Jung v. K. and D Mining Co.**, 356 US 335 (1958), this Honorable Court construed Rule 58 of the Fed. R. Civ. P. (App., infra, H-1), in conjunction with the final judgment rule embodied in 28 USC 1291. The **Jung** Court held that the "[d]istrict court's order of May 27, 1955, denying petitioners' motion to vacate the order of

May 10, 1955, but granting further leave to petitioners to amend their complaint, did not constitute the final judgment in the case. **It did not direct "that all relief be denied" (Rule 58 of the Federal Rules of Civil Procedure)** but left the suit pending for further proceedings "either by amendment of the [complaint] or entry of a **final** judgment"... It was the District Court's order of March 25, 1957, **dismissing "this cause of action", that constituted the final judgment in the case. It directed "that all relief be denied" and required "the clerk to enter judgment" accordingly (Rule 58).**" (Emphasis added) 356 US at 336 and 337. Accord **Paganis**, supra, 3 F3d. at 1071. ("What the [separate] judgment entry **must** do is state that the plaintiffs are denied all relief....The dispositive question is...whether the [separate] judgment entry is self-contained and sets forth the relief to which the parties are entitled").

The rationale and reasoning underlying the **Jung**

Court's holding, is that Rule 58 of the Fed. R. Civ. P. (App., infra, H-1) mandatorily requires that a separate document judgment, or a district court's Order, must direct and contain that all relief be denied as to all parties and causes of actions. This could be done if the district court's Order and/or separate document judgment indicates that the causes of actions are dismissed, or in the alternative, if it states that all relief be denied as to all parties and causes of actions. See also Rule 54(c) of the Fed. R. Civ. P. (App., infra H-2 to H-3).

Professor Moore has construed the **Jung**, supra, case stating that "**[a]n order dismissing an action in its entirety is a decision by the court "that all relief shall be denied", within the meaning of that phrase as it appears in Rule 58** [of the Fed. R. Civ. P.]" See 9 Moore's Federal Practice, section 110.13, footnote 1, page 111 (2d ed. 1993).

In the present case, the district court's Opinion and

Order and separate document judgment, both issued on the same day (January 15, 1993), did not contain a statement directing "that all relief be denied" as to all parties, or that the complaint's causes of actions were dismissed. (App., infra, C-1,C-9,C-10,D-1). As a matter of fact, the Opinion and Order and separate document judgment did not dismissed the complaint as to the federal respondents, and did not specifically dismissed petitioners causes of actions (the district court's Opinion and Order did not considered one (1) of the causes of actions included in petitioners original complaint, thus the district court failed to indicate whether said cause of action contained sufficient statements of facts to state a claim upon which relief could be granted).

In sum, the decision of the court of appeals in this case is contrary to the reasoning underlying this Court's holding in **Jung**, supra.

4. **The Decision of the Court of Appeals is**

Erroneous

In **P.R. Aqueduct and Sewer Auth. v. Metcalf and Eddy**, 113 S. Ct. 684, 687 (1993), this Honorable Court reaffirmed that "[T]itle 28 U.S.C. sec. 1291 provides for appeal from "final decisions of the district courts". Appeal is thereby precluded "from any decision which is tentative, informal **or incomplete**", as well as from any "fully consummated decisions, where they are but steps towards final judgment in which they will merge."..." (Emphasis added). In **Gulfstream Aerospace Corp. v. Mayacamas Corp.**, 485 US 271, 275 (1985), this Honorable Court also reafirmed that "[t]his Court long has stated that as a general rule a district court's decision is appealable under this section [28 USC sec. 1291] only when the decision "**ends the litigation on the merits and leaves nothing for the court to do but execute the judgment**". **Catlin v. United States**, 324 US 229, 233 (1945). The order at issue in this case has no such

effect: **indeed, the order ensures that litigation will continue in the District Court."**..." (Emphasis added). See also **Firestone Tire and Rubber Co. v. Risjord**, 449 US 368, 373-374 (1981).

There is no doubt that the district court's Opinion and Order and separate document judgment in this case, both issued on the same day, is a decision which is **incomplete** and therefore did not ended the litigation on the merits. It is incomplete, because ensured that the litigation will continue in the district court, when the district court's Opinion and Order implicitly invited and induced petitioners to file their first amended complaint to cure and save the causes of actions included in the original complaint. It was incomplete because it ensured that the litigation will continue in the district court because the district court's Opinion and Order and separate document judgment did not considered and decided whether **all the causes** of actions contained

sufficient statments of facts. It was incomplete, because it left the district court with a mission and duty to decide if all relief was denied to petitioners concerning federal respondents. The district court's Opinion and Order and separate document judgment (both dated January 15, 1993) granted only state respondents motion to dismiss failing to dismiss the complaint as to all the parties. See Rule 54 (b) of the Fed. R. Civ. P. See **Brower v. Inyo County**, 817 F2d 540, 542 (9th Cir. 1987). This conclusion is supported by the fact that the district court's intention to dismiss the complaint as to federal respondents **occurred on March 3, 1993**, date in which the district court issued an Order whereby declared moot petitioners motion requesting an extention of time to file their response to federal respondents motion to dismiss. (App., infra, G-7. See **Macdonnell v. U.S.**, 4 F3d 1227 (3rd Cir. 1993). Petitioners causes of actions could have been saved by amendment of the pleadings. This is so

because petitioners complaint was dismissed due to the insufficiency of the statements of facts. Therefore, the majority view holdings on this matter should prevail (the Seventh, Sixth, Third, Ninth and Tenth Circuits view). Therefore, the district court's Opinion and Order and separate document judgment dismissing only the complaint, did not constituted a final decision under 28 USC 1291 and consenquently was not appealable. It was the district court's Order dated April 19, 1993 (entered in docket on April 22, 1993), which stated that **"the case is closed"**, that constituted the final decision under 28 USC 1291. The phrase "the case is closed" is equivalent to saying that all the causes of actions were dismissed as to all parties, or that all relief was denied, thus complying with Rule 58 of the Fed. R. Civ. P. mandatory requirements. Since petitioners notice of appeal was filed (60 days to appeal when U.S. is a party) on May 14, 1993, within the 60 days time period from the

district court's docket entry of the Order stating the case is closed, it follows that petitioners notice of appeal was timely filed and, therefore, the Court of Appeals for the First Circuit has jurisdiction to entertain the appeal on the merits.

Finally, in case the respondents contends that the final decision or final judgment in this case ocurred on MArch 3, 1993, petitioners reply that on that date (March 3, 1993) the district court issued two (2) Orders: one declaring moot petitioners request for extention of time to respond to the federal respondents motion to dismiss (App. infra G-7); and the other Order denied petitioners leave to file their first amended complaint (App. infra, G-7 to G-8; and E-1). The district court's Order denying petitioners leave to amend the complaint was entered on docket on **March 9, 1993**, (App. infra G-7 to G-8). (See question number 7 of this Petitions, at page (i)). Therefore, the clock starts to click for appeal purposes

under 28 USC 1291 on March 9, 1993, assuming that the final judgment and/or final decision ocurred on March 3, 1993. But petitioners filed within the district court a timely Rule 59 (e) Motion for Reconsideration, which was filed and served on March 15, 1993 (App. infra, G-8). Therefore, this motion tolled the appeal clock. On April 19, 1993, the district court denied petitioners Motion for Reconsideration filed on March 15, 1993 (App. infra, F-1). Consequently, since petitioners Notice of Appeal was filed on May 14, 1993, (filed within the 60 day period of time allowed by Rule 4 of FRAP), the court of appeals below has jurisdiction to entertain petitioners appeal on the merits.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

In San Juan, Puerto Rico, August 23, 1994.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED

94 362 AUG 29 1994

OFFICE OF THE CLERK

NO.94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NORMA I. ACEVEDO-VILLALOBOS, AND THE OTHER PETITIONERS IDENTIFIED IN APPENDIX I-1 TO I-8

PETITIONERS

V.

HON. RAFAEL HERNANDEZ, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

NO. 94-

IN THE
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APPENDIX A-1

UNITES STATES COURT OF APPEALS
For the First Circuit

No. 93-1544

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,

Plaintiffs, Appellants,

v.

HON. RAFAEL HERNANDEZ, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., Senior U.S. District Judge]

Before
Cyr, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Jesus Hernandez-Sanchez, with whom Hernandez-Sanchez Law Firm was on brief For appellants.

Fidel A. Sevillano Del Rio, Assistant United States Attorney, with whom Guillermo Gil, United States Attorney, Donnie R. Murray, Deputy Regional Counsel, United States Department of Housing and Urban Development, and Teresa Pombo, Chief Counsel, United States Department of Housing and Urban Development, were on brief for appellEes, United States, et al.

Vannessa Ramirez-Kausz, Assistant Solicitor General for the Commonwelth of Puerto Rico, with whom Carlos Lugo-Fiol, Deputy Solicitor General, was on brief for appellee, Commonwealth.

April 28, 1994

BOWNES, Senior Circuit Judge. This appeal raises a procedural question of first impression in our circuit: whether the dismissal of a complaint, which does not explicitly dismiss the action, constitutes a "final decision[]," and is therefore appealable under 28 U.S.C. § 1291.[1] We rule in the affirmative, holding that the plaintiffs had both the right to appeal from the judgment dismissing their complaint and the duty to do so in a timely manner. Because plaintiffs' appeal was not timely, we lack jurisdiction to review the dismissal of the complaint. Furthermore, we conclude that appellate jurisdiction is lacking over the district court's denial of plaintiffs' first motion for postjudgment relief, and that their second such motion was untimely, and therefore properly denied by the district court. Accordingly, we

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[1] **Section 1291 provides: "The courts of appeals. . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."**

affirm.

I.

BACKGROUND

Plaintiffs-appellants are, for the most part, former employees of the Puerto Rico Public Housing Administration (PRPHA). On May 2, 1992, PRPHA and the Commonwealth of Puerto Rico, acting through former governor Rafael Hernandez Colon, signed an agreement with representatives of the United States Department of Housing and Urban Development (HUD). Under the agreement, the Commonwealth and HUD agreed to take certain actions in order to expedite the privatization of the management of federally funded public housing projects in Puerto Rico, as well as the decentralization of PRPHA. The privatization provisions of the agreement are at the center of plaintiff' claims.

The agreement committed the Commonwealth to

pursue, and HUD to support, a plan to privatize federally assisted housing projects by transferring the administration and maintenance of such projects to private contractors. As a result of this privatization, a sizeable percentage pf PRPHA's employees would be laid off. The agreement between HUD and PRPHA briefly addresses the plight of PRPHA's employees in a cursory manner:

> The private management process may require the elimination of positions within the present structure of the PRPHA. Employees holding said positions will receive benefits as provided by law. HUD will provide federal funding for payment of their benefits resulting from the federally funded public housing program. The Commonwealth will fund costs ineligible for federal funding.

Privatization Agreement. Art. I, § 4. In addition, PRPHA

agreed to encourage private contractors to employ displaced employees. Id. at § 6b. Shortly thereafter, PRPHA formulated a layoff plan to comply with the relevant provisions of Puerto Rico's Public Service Personnel Act. see 3 L.P.R.A. § 1336(6). A layoff plan was finalized in April 1992, and the privatization agreement was set to go into effect on August 1.

On June 26, 1992 letters were sent to PRPHA employees notifying them that,

> [s]ince you are one of the persons affected by layoffs, we notity you that owing to lack of work, we have no other alternative than to decree your layoff from public service effective July 31, 1992. We advise you of your right to present arguments or documentary evidence, if any [,] which you consider will benefit you, before the designated official.

On July 15, 1992, plaintiffs filed an action in United states District Court for the District of Puerto Rico against various Commonwealth and federal agencies and officers,[2] seeking injunctive, declaratory and monetary relief.

Plaintiffs' constitutional claims against the state defendants are predicated upon 42 U.S.C. § 1983, while their constitutional claims against the federal defendants are based on the doctrine set forth in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The major themes of plaintiffs' complaint are as follows. First, plaintiffs allege that the privatization agreement is invalid (and consequently that the layoffs were illegal) because

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[2] **The defendants in this action fall into two groups: the United States of America, HUD, and various HUD officials (hereinafter, the "federal defendants"), and the former governor of Puerto Rico, PRPHA, and various PRPHA officials. (hereinafter, the "state defendants"). All of the individuals were sued in their official and personal capacities.**

it was entered into in violation of both Puerto Rico and federal law, and that the various local and federal defendants acted ultra vires by signing the agreement. Accordingly, plaintiffs allege that the layoffs were illegal. Next, plaintiffs allege that they had a property interest in their jobs, and that they were deprived of this property interest without due process. Finally, plaintiffs maintain that a Puerto Rico official made derogatory comments about them in public, thereby depriving them of "liberty" without due process.

On October 27, 1992, the state defendants moved to dismiss the complaint, or alternatively, for summary judgment, on a plethora of grounds including, but not limited to, the complaint's failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Two days later the state defendants moved to stay discovery pending the court's resolution of their

dispositive motion. The court granted the requested stay.

On January 15, 1993, the district court granted the state defendants' motion to dismiss. The court stated that "[p]laintiffs' complaint fails to provide the Court with a clear idea of the contours of their claims and also fails to provide appropriate support for their allegations." Gonzalez v. Hernandez, No. 92-1972, slip op. at 4 (D.P.R. Jan. 15 1993). According to the court, plaintiffs' complaint was "infected with conclusory allegations and unfounded accusations," id. at 5-6, and "insufficciently illustrate[d] the essential nature of their claim[s]." Id. at 4. The court dismissed plaintiffs' complaint in its entirety, stating: " The Court therefore ORDERS that defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is hereby GRANTED and that plaintiffs' complaint is hereby DISMISSED." Id. at 6. On the same day the court entered judgment on a separate document, pursuant to

Fed. R. Civ. P. 58 and 79(a), which stated as follows: " By virtue of the Opinion & Order of the Court, entered on this date, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' complaint is DISMISSED." Plaintiffs filed two postjudgment motions for relief, both of which were denied. This appeal ensued.

II

DISCUSSION

In their notice of appeal filed May 14, 1993, plaintiffs list four decisions of the district court from which they appeal: (1) the judgment of January 15, 1993 dismissing the complaint, and the court's opinion and order of the same date; (2) the order of November 30, 1992 granting a stay of discovery; (3) the order of March 2, 1993 denying plaintiffs' first Rule 59(e) motion for reconsideration and to amend the complaint; and (4) the order of April 19, 1993 denying plaintiffs' second Rule

59(e) motion for reconsideration.[3]

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[3] The plaintiffs asserted, at oral argument before us, that the district court had dismissed only the state defendants' claims, leaving the federal defendants' claims unresolved. Thus, appellants argued, this court should remand the case to permit the district court to comply with Fed. R. Civ. P. 54(b) (where multiple claims or parties are involved court may direct entry of final judgment as to one or more but fewer than all the claims or parties). At no point did plaintiffs ever assert or suggest this contention before the district court, either in their motions for reconsuderation or in any of their numerous other postjudment filings. In all events, however, their belated contenton, if not waived, is without merit.

The district court unmistakably intented to dismiss the complaint in toto, pursuant to Fed. R. Civ. P. 12(b) (6), for failure to state a cognizable cause of action. Its opinion and order is most reasonably read as having dismissed the entire complaint even though it adverts only to the motion to dismiss filed by the state defendants. Furthermore, the final judgment itself expressly dismissed "the plaintiffs' complaint" after the federal defendants had filed their own motion to dismiss shortly before the district court entered its opinion and final judgment. We are satisfied, therefore, that plaintiffs' belated Rule 54(b) contention in no sense warrants an inference that plaintiffs were misled or the judgment was not final. Consequently, the requirements of Rule 54(b) are not implicated.

A. Dismissal of the Complaint

Under Fed. R. App. P. 4(a) (1), any party appealing from a judgment or order of the district court, where "the United States or an officer or agency thereof is a party," must file a notice of appeal within sixty days of the date of entry of the judgment or order. Timely filing of a notice of appeal is "mandatory and jurisfictional." Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281, 283 (1st Cir. 1993) (quoting Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978)). In the present case, plaintiffs' notice of appeal was filed more than 100 days after entry of the judgment dismissing the complaint. But, under Fed. R. App. P. 4(a) (4), a timely motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) tolls the time for filing a notice of appeal, and the time for filing the notice starts to run from the entry of the order denying said motion. See United

States v. 789 Cases of Latex Surgeon Gloves, 13 F.3d 12, 14 (1st Cir. 1993); Fed. R. App. P. 4(a) (4). Under Rule 59(e), "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

Although plaintiffs' original Rule 59(e) motion was timely filed (it was served within ten days from the entry of the judgment dismissing the complaint), their notice of appeal was not filed until sixty-four days after the entry of the order denying of the motion. Thus, even with the benefit of Rule 4(a) (4)'s tolling provision, plantiffs' notice of appeal was seemingly late. We lack jurisdiction over late appeals.

This brings us to the principal issue on appeal: Plaintiffs now argue that the judgment dismissing their complaint was not a "final decision:" within the meaning of 28 U.S.C. § 1291, and that their time to file a notice of

appeal did not start to run until the denial of their second motion for reconsideration. Because the notice of appeal was filed within sixty days from the entry of the order denying the second motion, plaintiffs maintain that their notice of appeal was timely with respect to the underlying judgment.

We have never ruled on this procedural dilemma. It has, however, given rise to some disagreement among those circuits that have. Three distinct views have emerged. The Seventh and Ninth Circuits have held that the dismissal of a complaint, as opposed to the dismissal of an action, is not a final, appealable order, unless the trial court has made clear in dismissing the complaint that the action could not be saved by amendment. See Benjamin v. United Sates, 833 F.2d 669, 672 (7th Cir. 1987); Ruby v. Secretary of United States Navy, 365 F.2d 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011

(1967). On the other hand, the Second and Eighth Circuits have held that, absent an express grant of leave to amend, an order dismissing the complaint is final and appealable. See Weisman v. LeLandais, 532 F.2d 308, 309 (2d Cir. 1976); Quartana v. Utterback, 789 F.2d 1297, 1300 (8th Cir. 1986). Finally, the Eleventh Circuit has carved out a middle ground. It has held that such an order of dismissal is not final if "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." Czremcha v. International Ass'n of Mach. & Aero. Workers, 724 F.2d 1552, 1555 (11th Cir. 1984).

Before deciding which,if any, of these three approaches to adopt, we briefly explain the rationale underlying each. The Seventh and Ninth Circuits have held that the dismissal of a complaint is not final and appealable because a motion to dismiss is not a

"responsive pleading" within the meaning of Fed. R. Civ. P. 15(a),[4] and thus a plaintiff still retains his or her rights to amend once as a matter of course under Rule 15(a) even after a motion to dismiss has been granted. See Car Carries, Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); 222 East Chestnut St. Corp. v. Lakefront Realty Corp., 256 F.2d 513 (9th Cir.), cert. denied, 358 U.S. 907 (1958).

In Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 448 n.1 (2d Cir. 1978), the Second Circuit explained that the split on this issue was based on the circuits'

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[4] **Rule 15(a) provides, in relevant part:**

> **A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.**

differing views on the right to amend a complaint under Rule 15(a) once a motion to dismiss has been granted. The court stated:

> [w}hile the law in this circuit is that a motion to dismiss is not a responsive pleading, and therefore the complaint may be amended without leave of the court [after such a motion is made], it is equally well established that this right terminateS upon the granting of the motion to dismiss.

Id. (citations omitted). The Eighth Circuit, which shares the Second Circuit's view that the right to amend under Rule 15(a) terminates upon dismissal, found that this distinction provided support for following the Second Circuit's rule that the dismissal of a complaint was a "final decision," but did not view the distinction dispositive.[5]

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[5] **The court cited the Eleventh Circuit's opinion in Czeremcha, 724 F.2d at 1554-56, to illustrate this point. According to the Eleventh Circuit, after a complaint is dismissed the right to**

Ultimately, the Eighth Circuit joined the Second, reasoning as follows:

> Where matters of finality (and therefore of appellate jurisdiction) are concerned, we believe it preferable to adopt rules that promote clarity and certainnty. The Second and Ninth Circuit rules have an advantage over that of the Eleventh Circuit in this regard because they focus solely on the 'anguage of the dismissal order, requiring an explicit contrary statement to avoid a presumption of finality (Second Circuit) or non-finality (Ninth Circuit). Comparing the Second and Ninth Circuit rules, that of the Second Circuit commends itself because it

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amend under Rule 15(a) terminates. But the dismissal does not act as a final judgment, and the plaintiff may still move the court for leave to amend unless the "court has clearly indicated either that no amendment is possible or that dismissal of the complaint also constitutes action." Id. at 1556 n.6.

Supreme Court, U.S.
FILED
OCT 28 1994
OFFICE OF THE CLERK

No. 94-362

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,
PETITIONERS

v.

RAFAEL HERNANDEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over the district court judgment dismissing the complaint, because petitioners' notice of appeal therefrom was untimely filed.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 22 F.3d 384. The opinion and order of the district court (Pet. App. C1-C10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1994. A petition for rehearing was denied on June 7, 1994 (Pet. App. B1-B2), and the petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are former employees of the Puerto Rico Public Housing Administration (PRPHA). On July 15, 1992, petitioners filed a complaint in federal district court in the Commonwealth of Puerto Rico against various Commonwealth and federal agencies and officers. The complaint challenged a May 1992 agreement between the Commonwealth and the United States Department of Housing and Urban Development (HUD) under which the Commonwealth and HUD agreed to expedite the privatization of the management of federally funded housing projects in Puerto Rico, and to decentralize the PRPHA. Pet. App. A4, A7. Petitioners, who sought injunctive, declaratory, and monetary relief, alleged that the agreement had caused the transfer to private contractors of the administration and maintenance of those projects, resulting in the layoff of a large percentage of the PRPHA's employees. *Id.* at A5-A7. The court of appeals summarized the "major themes" (*id.* at A7) of petitioners' complaint as follows (*id.* at A7-A8):

> First, plaintiffs allege that the privatization agreement is invalid (and consequently that the layoffs were illegal) because it was entered into in violation of both Puerto Rico and federal law, and that the various local and federal defendants acted *ultra vires* by signing the agreement. * * * Next, plaintiffs allege that they had a property interest in their jobs, and that they were deprived of this property interest without due process. Finally, plaintiffs maintain that a Puerto Rico official made

derogatory comments about them in public, thereby depriving them of "liberty" without due process.[1]

On October 27, 1992, the Commonwealth defendants moved to dismiss the complaint on a number of grounds, including failure to state a claim upon which relief could be granted. Pet. App. A8. On January 11, 1993, the United Stat moved to dismiss on behalf of the federal defendants. *Id.* at G3.

2. On January 15, 1993, the district court issued an opinion and order granting the Commonwealth defendants' motion to dismiss (Pet. App. C1) and issued a separate judgment dismissing petitioners' entire complaint (*id.* at D1). The court explained that the complaint "fails to provide the Court with a clear idea of the contours of their claims and also fails to provide appropriate support for their allegations," and "is infected with conclusory allegations and unfounded accusations." *Id.* at C5-C6, C-9. Those rulings were entered on the district court docket on January 19, 1993, along with entries noting "Case closed" and "CASE sent to closed file." *Id.* at G4.

On February 1, 1993, petitioners filed a motion styled, "MOTION FOR RECONSIDERATION AND OR TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e) AND REQUEST OF RELIEF FROM JUDG-

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[1] Other PRPHA employees and their union filed a similar suit against the Commonwealth and the federal defendants in the Superior Court of Puerto Rico. The case was removed to federal district court. The district court dismissed all claims against the federal defendants for failure to state a cause of action, and it remanded the case insofar as it involves claims against the Commonwealth defendants. *American Federation of Pub. & Private Employees* v. *Commonwealth*, Civ. No. 92-1948 (D.P.R. Nov. 23, 1993). We have been informed that the case is pending.

MENT UNDER RULE 60(b)(6) AND REQUEST TO AMEND COMPLAINT," together with a proposed amended complaint. Pet. C.A. App. 131, 145. On the same date, petitioners also filed a memorandum of law in support of their motion to amend the complaint. *Id.* at 167. On March 3, 1993, the district court denied petitioners' motion for reconsideration and to amend the complaint. Pet. App. E1. That order was entered on the docket on March 9, 1993. *Id.* at G8-G9. Also on March 3, 1993, the district court issued an order declaring moot petitioners' motion to extend the time within which to respond to the federal defendants' motion to dismiss. *Id.* at G7.

On March 15, 1993, petitioners filed a second motion for reconsideration. Pet. C.A. App. 213. On April 21, 1993, the district court denied that motion. Pet. App. F1. The denial was entered on the district court docket the following day. *Id.* at G8-G9.

3. On May 14, 1993, petitioners filed a notice of appeal. Pet. App. G9. The notice was filed 64 days after entry of the order denying their first motion for reconsideration and 22 days after entry of the order denying their second motion for reconsideration. *Id.* at A13.

4. The court of appeals held that petitioners' appeal was untimely and that the court therefore lacked jurisdiction over the appeal. Pet. App. A1-A31. Under Fed. R. App. P. 4(a)(1), the court explained, a party appealing from a judgment or order of a district court in a case to which "the United States or an officer or agency thereof is a party" must be filed within 60 days of the notice of entry of the judgment or the order. Under Fed. R. App. P. 4(a)(4), a timely motion to alter or amend judgment made under Fed. R. Civ. P. 59(e) tolls the time for filing the notice of appeal, which then starts to run from the entry of the order denying such motion. Pet.

App. A12. In this case, the court pointed out, the notice of appeal was filed more than 100 days after entry of the judgment dismissing the complaint, and 64 days after entry of the order denying the motion for reconsideration. Thus, the court concluded, "even with the benefit of Rule 4(a)(4)'s tolling provision, plaintiffs' notice of appeal was seemingly late. We lack jurisdiction over late appeals." *Id.* at A13.

The court of appeals also rejected petitioners' contention that the judgment dismissing the complaint was not a "final decision" under 28 U.S.C. 1291 that triggered the 60-day deadline to file a notice of appeal, and that the district court's "final decision" was in fact its denial of the second motion for reconsideration. Pet. App. A13-A14.[2] The court noted that the courts of appeals had applied different standards for determining when dismissal of a complaint (as distinguished from dismissal of an action) is a final appealable order. The Seventh and Ninth Circuits had held that dismissal of a complaint is final only if "the trial court has made clear in dismissing the complaint that the action could not be saved by amendment." *Id.* at A14-A15 (citing *Benjamin* v. *United States*, 833 F.2d 669, 672 (7th Cir. 1987), and *Ruby* v. *Secretary of United States Navy*, 365 F.2d 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967)). The Eleventh Circuit had held that an order dismissing a complaint is final unless "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." Pet. App. A15 (quoting *Czeremcha* v. *International Ass'n of Machinists*, 724 F.2d 1552, 1555 (11th Cir. 1984)). And the Second and

[2] Had the district court agreed with that argument, the notice of appeal, filed 22 days after denial of the second motion for reconsideration, would have been timely.

Eighth Circuits had held that an order dismissing a complaint is final and appealable absent express grant of leave to amend. Pet. App. A15 (citing *Weisman* v. *LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976), and *Quartana* v. *Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986)). Adopting the standard used by the Second and Eighth Circuits, the court of appeals held that the dismissal of the complaint in this case was final, because the district court had not expressly granted leave to amend. Pet. App. A20.

In the court's view, several factors made a finding of finality particularly appropriate in this case. First, any leave to amend the complaint as a matter of right pursuant to Fed. R. Civ. P. 15(a) had terminated upon dismissal of the complaint. Pet. App. A20. Second, the dismissal had been set forth in a separate document, as required for final judgments under Fed. R. Civ. P. 58. Pet. App. A20. Third, "plaintiffs, as evidenced by their Rule 59(e) motions, apparently understood the judgment to be final." *Id.* at A20-A21. Finally, dismissal of the complaint accorded with this Court's definition of a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at A21 (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981)). The court explained (Pet. App. A21-A22):

> Here the complaint was dismissed by the district court for failure to state a claim, and judgment was then entered on the docket and set forth on a separate document in accordance with Fed. R. Civ. P. 58 and 79(a). Accordingly, the dismissal of plaintiffs' complaint possesses all of the markings of a "final decision."

Finally, the court of appeals rejected petitioners' claim that the second motion for reconsideration had extended the time period for filing a notice of appeal. Pet. App. A22-A23 ("[i]t is well settled that a motion for reconsideration served more than ten days after the entry of judgment does not affect the time for appealing from that judgment"). The court of appeals also held that the district court correctly dismissed the second motion for reconsideration for lack of jurisdiction, on the ground that the motion was untimely filed. *Id.* at A30.[3]

ARGUMENT

1. Petitioners urge review to resolve the circuit conflict noted by the court of appeals regarding the circumstances under which the dismissal of a complaint constitutes an appealable final decision. Pet. 20-33. This case, however, is not an appropriate one in which to resolve that conflict, because it is clear that under any of the standards used by the courts of appeals, the order dismissing petitioners' complaint would have been considered final and hence appealable, rendering petitioners' notice of appeal untimely.

As the court below noted (Pet. App. A14-A15), the courts of appeals have adopted three distinct standards for determining when dismissal of a complaint becomes final. It adopted the view of the Second and Eighth Circuits that, absent an express grant of leave to amend, an order dismissing a complaint is final and appealable. *Id.* at A15; see *Weisman* v. *LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976); *Quartana* v. *Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986). Petitioners do not dispute that that

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[3] Petitioners do not argue in this Court that the court of appeals erred in affirming the district court's denial of the second motion for reconsideration.

standard was properly applied here, since the district court, in dismissing the complaint, conferred no express grant of leave to amend.

The Third, Sixth, Seventh, and Ninth Circuits, by contrast, have held that the dismissal of a complaint, as distinguished from the dismissal of an action, is final only if the district court has made it clear in dismissing the complaint that the action could not be saved by amendment. Pet. App. A14-A15; see *Benjamin* v. *United States*, 833 F.2d 669, 672 (7th Cir. 1987); *Borelli* v. *City of Reading*, 532 F.2d 950, 951-952 (3d Cir. 1976); *Azar* v. *Conley*, 480 F.2d 220, 222-223 (6th Cir. 1973); *Ruby* v. *Secretary of United States Navy*, 365 F.2d 385, 387 (9th Cir. 1966), cer. denied, 386 U.S. 1011 (1967). Given the actions taken by the district court in this case, the dismissal of the complaint would plainly have been held final under that standard as well. In dismissing the complaint, the district court entered a separate judgment granting the pending motion to dismiss, and also caused the notation "Case closed" (Pet. App. G4) to appear on the case docket. To the extent any ambiguity remained after the court took those steps, it was eliminated when the district court, on March 3, 1993, denied petitioners' first motion for reconsideration and their concomitant motion to file the proposed amended complaint. Those actions made clear that, in dismissing the complaint, the district court intended to dismiss with prejudice and preclude amendment of the complaint. See *Benjamin*, 833 F.2d at 672; *Ruby*, 365 F.2d at 387. Yet not until more than 60 days after the first motion for reconsideration and the motion to amend the complaint were denied did petitioners file a notice of appeal. The court of appeals thus properly held under Fed. R. App. P. 4(a)(1) that it lacked appellate jurisdiction. See *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978)

(time limits under Fed. R. App. P. 4(a) are "mandatory and jurisdictional").[4]

Finally, the Fifth and Eleventh Circuits have held that an order dismissing a complaint is not final if "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." *Czeremcha* v. *International Ass'n of Machinists*, 724 F.2d 1552, 1555 (11th Cir. 1984); see also *Whitaker* v. *City of Houston*, 963 F.2d 831, 834-835 (5th Cir. 1992). The district court's actions in this case—including denoting the case as "closed," denying reconsideration, denying the motion to file a proposed amended complaint, and declaring "moot" petitioners' motion for additional time to respond to the federal respondents' motion to dismiss—gave petitioners more than ample notice that the court was entering a final order. Indeed, as the court of appeals observed, "plaintiffs, as evidenced by their Rule 59(e) motions, apparently understood the judgment to be final" (Pet. App. A20-A21), yet failed to file a timely notice of appeal even after the denial of the first of those motions.

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[4] Given their failure to file a timely notice of appeal even after denial of their motion to file the proposed amended complaint, petitioners' reliance on purportedly ambiguous language in the district court's opinion dismissing the complaint regarding the possibility of amendment (Pet. 13, 36) is unavailing. The action of the district court in refusing to reconsider its earlier ruling or to accept an amended complaint clearly established the finality of its dismissal. Also immaterial is petitioners' claim (Pet. 26) that the district court was initially ambiguous about whether it was dismissing the complaint as to all parties or only the Commonwealth respondents. As the court of appeals noted (Pet. App. A11 n.3), the district court's declaration that petitioners' motion for an extension of time to reply to the United States' motion to dismiss was moot made it apparent that the complaint had been dismissed in its entirety.

In sum, there is no basis for concluding that petitioners' appeal would have been found to have been filed within 60 days of a final district court order under any of the standards employed by the courts of appeals. Thus, this case does not present a suitable vehicle for addressing the circuit conflict on the finality issue identified by petitioners.

2. Also unavailing is petitioners' contention (Pet. 33-35) that review is warranted to address a purported circuit conflict on the issue of whether a plaintiff retains the right to amend a complaint once as a matter of course under Fed. R. Civ. P. 15(a) after the district court has granted a motion to dismiss. Rule 15(a) provides that a plaintiff may amend a complaint once "as a matter of course at any time *before a responsive pleading is served*" (emphasis added). In this case, the federal respondents had answered the complaint (Pet. App. G2-G3) by the time petitioners moved to amend the complaint. Whether or not a dismissal alone would have terminated petitioners' right to amend, once a responsive pleading had been served, petitioners were permitted to amend only by leave of court. Accordingly, the issue giving rise to the circuit conflict identified by petitioners is not presented in this case.[5]

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[5] Petitioners also claim (Pet. 37-39) that the court below erred in interpreting the district court's dismissal as relating to all parties and not just the state defendants. Thus, petitioners argue (Pet. 38), the decision below conflicts with cases in which dismissal of some but not all claims (or parties) was held not to be a final decision. Petitioners ignore the fact that the United States moved to dismiss, and that the district court made clear that it had dismissed the entire complaint as it related to all parties. Pet. App. D1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

Supreme Court, U.S.
FILED
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RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS REPLY BRIEF

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TREATISE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. 94-362

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,

PETITIONERS

V.

HON. RAFAEL HERNANDEZ, ET AL.,

RESPONDENTS

PETITIONERS REPLY BRIEF

Comes now petitioners and most respectfully presents herein to this Honorable Court petitioner's Reply Brief with respect to federal respondents Brief in Opposition.

FEDERAL RESPONDENTS QUESTION PRESENTED

On November 1, 1994, petitioners' counsel of record received the Brief for the federal respondents in opposition to petitioners Petition for a Writ of Certiorari. The federal respondents brief in opposition presented the following question: "Whether the court of appeals correctly held that it lacked jurisdiction over the district court judgment dismissing the complaint, because petitioners' notice of appeal therefrom was untimely filed."

PETITIONERS REPLY AND ARGUMENTS[1]

A- FEDERAL RESPONDENTS MAIN CONTENTION

Federal respondents brief in opposition only makes

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[1] **Rule 15 (.6) of the Supreme Court Rules (28 U.S.C.A. Rule 15, 1993 Cumulative Annual Pocket Part) states in relevant part that "[a] reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing...."**

one (1) main contention and argument, as follows (see Fed. Respondents Brief, at page 7): "Petitioners urge review to resolve the circuit conflict noted by the court of appeals regarding the circumstances under which the dismissal of a complaint constitutes an appealable final decision, Pet. 20-33. **This case, however, is not an appropriate one in which to resolve that conflict, because it is clear that under any of the standards used by the court of appeals, the order dismissing petitioners' complaint would have been considered final and hence appealable, rendering petitioners' notice of appeal untimely."** (Emphasis supplied).

The above argument was first raised by the petitioners on their Petition for a Writ of Certiorari (see Pet., at pages 31 to 33, and 52), therefore we are precluded at this stage by Rule 15 (.6) of the Supreme Court Rules (see footnote 1 of this Reply Brief) to reargue on this matter. We reaffirm our contention that under the mayority view

adopted by the circuits, petitioners appeal would have been entertained on the merits. We will limit ourselves to indicate that in **Paganis v. Blonstein**, 3 F3d 1067 (7th Cir. 1993), the Seventh Circuit confronted, assessed and ruled regarding two (2) different separate document judgments entries as well as two (2) different memorandums opinion and orders. See **Paganis**, 3 F3d, at 1068 and 1069. The **Paganis** Court held in **1993**[2] among other things the following (3 F3d, at 1070 and 1071): "The dismissal of a complaint **does not end the litigation**..... **Therefore, if a [separate] judgment entry dismisses only the complaint, it is not a final judgment.... What the [separate] judgment entry must**

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[2] The conflicts in our case **are live issues of federal law (appellate jurisdiction and federal practice and procedure). The main issue in Paganis, supra, (whether a separate judgment entry which dismissed a complaint constitutes a final decision under 28 U.S.C. 1291) was decided on August 24, 1993.**

do is state that the plaintiffs are denied all relief.... " (Emphasis ours and in original).[3]

As a matter of fact, federal respondents brief in opposition failed to discuss in depth the applicable caselaw in order to explain and ground properly their contention that under any of the three (3) approaches and standards held by the circuits, petitioners notice of appeal would have been found untimely filed. For

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[3] **Rule 54 (c) of the Fed. R. Civ. P. mandates in relevant part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." While Rule 58 of the Fed. R. Civ. P. requires mandatorily in relevant part that a decision of the district court shall state "that all relief shall be denied". (See Pet. App. H-1 to H-3). In this case, the district court's Opinion and Order and the separate document judgment (both dated and issued on the same day) did not complied with the mandatory requirements of Rules 58 and 54 (c) of the Fed. R. Civ. P., because neither of which stated that all relief was denied as to all parties and as to all the causes of actions.**

example, the petition for certiorari cited and quoted **Paganis v. Blonstein**, 3 F3d, 1067 (7th Cir. 1993), but the federal respondents omitted to cite and discuss the facts and holdings contained in **Paganis**, supra, in order to support their allegations.

Federal respondents **sub silentio** conceded and accepted petitioners arguments based on our legal reseach, analysis and summarization regarding the description of the three (3) conflicting views among the circuits (see Fed. Respondents brief, at pages 7, 8 and 9); and they also expressly conceded and accepted petitioners contention that the mayority view among the circuits (the Seventh, Ninth, Third, and Sixth) adopted the ruling that a mere dismissal of the complaint is not a final decision and/or final judgment for appeal purposes under 28 U.S.C. 1291. (See Fed. Respondents Brief, at page 8) There are in fact a five (5) circuit mayority view, instead of four (4). See Pet, at pages 22-24.

B- **OTHER ARGUMENTS MADE BY FEDERAL RESPONDENTS**

1- Federal respondents contended that it is unavailing petitioners argument that review by this Honorable Court is warranted to "address a purported circuit conflict on the issue of whether a plaintiff retains the right to amend a complaint once as a matter of course under Fed. R. Civ. P. 15(a) after the district court has granted a motion to dismiss." (See Fed. Respondents Brief, at page 10). Federal respondents argued that this issue of federal practice and procedure "is not present in this case". Id. The opinion of the court of appeals below addressed this issue in the following manner (Pet. App. A-15 to A-16): "Before deciding which, **if any**, of these three approaches to adopt, **we briefly explain the rationale underlying each**. The Seventh and Ninth Circuits have **held** that the dismissal of a complaint is not final and appealable because a motion to dismiss is not a "responsive

pleading".... **and thus a plaintiff still retains his or her right to amend once as a matter of course under Rule 15 (a) even after a motion to dismiss has been granted**...In **Elfenbein v. Gulf and Western Indus. Inc.,**..., the Second Circuit explained that the **split on this issue was based on the circuit's differing views on the right to amend a complaint under Rule 15 (a) once a motion to dismiss has been granted."** (Emphasis ours).

There is a split and square conflict on this issue of federal practice and procedure among the circuits. (See Pet., at pages 19, 33-36). In our case, the district court's Opinion and Order, as well as the separate judgment (both dated and issued on the same day), merely dismissed the complaint and granted only state respondents motion to dismiss. (See Pet. App. C-1 to C-10; D-1). State respondents did not filed an answer to the complaint, therefore, even after the district court had issued its Opinion and Order and separate judgment

granting only state respondents motion to dismiss and dismissing merely the complaint, petitioners retained their right to amend the complaint for the first time once as a matter of course under Rule 15 (a) of the Fed. R. Civ. P. (See **Paganis**, supra, 3 F3d, at 1072 and 1073; and see also Pet., at pages 34, 35 and 36).

2- Federal respondents alleged that the district court's dismissal of the Complaint was related to **all** parties and claims (and not just to the state defendants), because "the district court made clear that it had dismissed **the entire complaint** as it related to all parties." (Emphasis ours) (See Fed. Respondents Brief, at Page 10, footnote 5). They also alleged that "[i]n dismissing the complaint, the district court entered a separate judgment **granting the pending motion to dismiss**...."[4] Id., at page 8. (Emphasis ours). They also

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[4] The phrase "**the pending motion to dismiss**", refers to federal

alleged that the separate judgment dismissed petitioners' "entire complaint". Id., at 3. **Today, on November 1994, federal respondents avers that the district court below dismissed the entire complaint as to all parties, but on February 26, 1993, the federal respondents filed a motion within the district court requesting, among other things, and we quote, that "the case against them should be dismissed."** (Pet., at pages 15 and 16, and footnote six (6)).

As acknowledge by the court of appeals below in its opinion, petitioners filed a complaint on July 15, 1992 which contained multiple parties (state respondents and

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respondents motion to dismiss filed within the district court on January 11, 1993, entered on the civil docket on January 13, 1993 (See Pet. App., at page G-3 and G-4). The district court's Opinion and Order and the separate document judgment (both dated and issued on January 15, 1993) does not make an express or implied reference to federal respondents motion to dismiss. See Pet. App., C-1-C-10, D-1.

federal respondents) and multiples causes of actions. See Pet App., A-7, footnote 2; and A-7 to A-8. The district court's separate judment dated January 15, 1993 (see Pet. App. D-1), did not granted federal respondents motion to dismiss; and did not used the phrase "the entire complaint is dismissed". The district court's opinion and order did not used the phrase " the entire complaint is dismissed". The federal respondents completly and clearly erred in concluding that the separate judgment contained an express or implied statement granting federal respondents motion to dismiss; and erred in concluding that the separate judgment dismissed the entire complaint.

The district court's separate judgment clearly indicates that said judgment was grounded, issued and based **solely** on the district court's opinion and order: "**By virtue of the Opinion and Order of the Court**, entered on this date,... plaintiffs' complaint is DISMISSED...." (See

Pet. App. D-1). In turn, the district court's opinion and order dated January 15, 1993 (see Pet. App., at page C-1; C-9 to C-10), **only granted state respondents motion to dismiss**, and merely dismissed the complaint without dismissing the causes of actions. For example, the district court assessed and discussed petitioner's Due Process claim (cause of action) **only in the following manner** (Pet. App., at C-6): **"Plaintiffs allege that they are career employees but fail to cite to any state law provision providing such a property interest. See Complaint paragraph 2."** This quoted statement made by the district court in its opinion and order, is the only discussion and assessment made by the district court regarding petitioners Due Process Claim (cause of action) contained in the original complaint. Does the above quoted statement made by the District Court in its opinion and order dated January 15, 1993, constitutes a final decision dismissing petitioners Due Process cause

of action? **We think not.** Therefore, the district court's opinion and order and separate judgment did not dismissed petitioner's complaint **as to all parties and claims**, consequently, it did not constituted the final decision and/or final judgment within the meaning of 28 USC 1291, and was not appealable. In addition, the district court and the court of appeals below did not considered and assessed at all one (1) of the claims contained in the original complaint. (See Pet. at pages 9, 13, 14 and 48).

The opinion of the court of appeals below failed to evaluate and consider the district court's opinion and order dated January 15, 1993, in determining whether the separate judgment dated January 15, 1993 constituted the final decision under 28 USC 1291.[5]

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[5] **The separate judgment was issued and grounded by virtue of the Opinion and Order of the D.C. having both the same date. See Pet., App. D-1.**

Federal respondents brief in opposition states that: "[a] s the court of appeals noted (Pet. App. A11 n.3), the district court's declaration that petitioners' motion for an extension of time to reply to the United States' motion to dismiss was moot, made it apparent that the complaint had been dismissed in its entirety." (See Fed. Respondents Brief, at page 9, footnote 4). **This statement and conclusion made by federal respondents is completly misleading**. The opinion of the court of appeals below did not make reference **at all** to the district court's Order dated March 3, 1993, declaring moot petitioners motion for an extension of time to reply to the United States motion to dismiss. As mentioned before, the opinion of the court of appeals below failed to consider and assess the district court's record in determining whether a mere dismissal of a complaint constitutes a final judgment and/ or final decision under 28 USC 1291. This is contrary to this

Honorable Court's holding in **Bankers Trust Co., vs. Mallis**, 433 US 381, 385, 386 (1978). See Pet., at pages 42-45.

It is important to note that the district court's Opinion and Order dated January 15, 1993 (the separate judgment was also dated january 15, 1993, and said judgment was issued and grounded by virtue of the Opinion and Order dated January 15, 1993) invited and induced petitioners to file their first amended complaint (**which constituted an implied grant of leave to amend**), when it stated the following: "**It is unfortunate that although the defendants' conduct may in fact be actionable, the Court has not been put in a position to even begin to evaluate the alleged constitutional violations.**" See Pet. App. C-9. Because the district court invited petitioners to file their first amended complaint, and because the district court's opinion and order and separate judgment dismissed only the complaint without

dismissing the causes of actions, grounded on the insufficiency of the statements of facts as to who did what to whom and why, then it follows that the district court did not intented its Opinion and Order and separate judgment to constitute the final decision and/or final judgment for appeal purposes under 28 USC 1291, and hence they were unappealable. This conclusion is further supported by the fact that the case at hand involved **multiple parties** and multiple causes of actions, and that the district court's Opinion and Order and separate judgment did not dismissed the complaint **as to all the parties**, and did not dismissed **all the causes of actions**. Professors Moore and Wright, both coincide and are in accord that in cases dismissing only the complaint involving multiple parties and claims, a district court's dismissal of a complaint must be unequivocal and must dismiss the complaint **as to all parties and claims**. See 9 Moore's Federal Practice, section 110.13 [1], at pages

111-113, 2d. edition 1993 ("If the action involves multiple claims or multiple parties and the order disposes of one or more but fewer than all of the claims or disposes of the claims and defenses of one or more **but fewer than all the parties, it is not immediately appealable** absent entry in accordance with the provisions of Rule 54 (b) or unless it fits within one of the practical finality doctrines.") See also Wright, Miller and Cooper, Federal Practice and Procedure, 2d edition 1993 (specific citations omitted). See also **Brower v. Inyo County**, 817 F2d 540,542 (9th Cir. **1987**) ("In an action involving multiple defendants, **the dismissal of the complaint only**, without dismissal of the action, **is not a final judgment.**").

3- Federal respondents, as well as the court of appeals below, concluded as a matter of law that after the district court had issued its Opinion and Order and separate judgment, the petitioners filed within the district court a motion under Rule 59 (e) of the Fed. R. Civ. P.,

which tolled the time for filing the notice of appeal. (See Fed. Respondents Brief, at pages 3, 4 and 5; and see the opinion of the court of appeals below, Pet. App., at pages A-12, A-13 and A-25). In our opinion, federal respondents and the court of appeals below erred in concluding that petitioners motion requesting leave to amend the complaint filed on February 1, 1993, constituted a Rule 59 (e) motion which tolled the time to file the notice of appeal. It is very important to point out that the February 1, 1993 motion requesting leave to amend was accompanied by a Memorandum of Law in Support to Amend Complaint and by a proposed amended complaint. See Pet. at pages 15.

This Honorable Court has held that a Rule 59 (e) motion can only be made from a final judgment and/or a final decision for appeal purposes under 28 USC 1291. See **Osterneck v. Ernst and Whinney**, 489 US 169, 173-174 (1989). Professor Moore has clearly indicated that a

Rule 59 (e) motion " suspends the **finality of the judgment** for purposes of appeal..." (See 6A Moore's Federal Practice, section 59.12, at 59-259 and 59-262, 2d edition 1989.). In the case hand, because the January 15, 1993 separate judgment and Opinion and Order did not constituted a final decision and/or final judgment for appeal purposes under 28 USC 1291, then it follows that petitioners motion requesting leave to amend filed on February 1, 1993 (see Pet, at page 15, 53-54) cannot be considered a Rule 59 (e) motion that tolled the appeal clock. There was nothing to toll on January 15, 1993, because the district court had not yet issued a final judgment and/or a final decision within the meaning of 28 U.S.C. 1291. **An unappealable order or judgment does not divest the district court of jurisdiction**. See **Griggs v. Provident Consumer Discount Co.,** 459 US 56 (1982), at page 58. Therefore, the final judgment and/or final decision under 28 USC 1291 occurred either on

March 3, 1993 (see Pet., at pages 53-54), or on April 19, 1993 (see PEt., at pages 52-53).

C- **HONORABLE SUPREME COURT'S EXPRESSIONS REGARDING A DISMISSAL OF A COMPLAINT**

Most respectfully, we finalize this Reply Brief by quoting recent expressions made by this Honorable Court which we believe favors the ruling that a mere dismissal of a complaint does not constitutes a final decision and/or final judgment within the purview of 28 U..S.C. 1291: "In our view, this interpretation of Rule 4 (a) (2) best comports with its drafters' intent, as cases cited in the Advisory Committee's Note on Rule 4 (a) (2) confirm. For example, in **Ruby v. Secretary of Navy**, 365 F2d 385 (CA9 1966), cert. denied, 386 US 1011 (1967), the appellant filed his notice of appeal **from an order of the District Court that dismissed the complaint without dismissing the action. The Court of**

Appeals determined that the ruling was not a final decision under sec. 1291, because the ruling left open an opportunity for the appellant to save his cause of action by amending his complaint. 365 F2d, at 387. Nonetheless, the court ruled that the notice of appeal from the **nonfinal ruling** could serve as a notice of appeal **from the subsequently filed final order dismissing the action."** (Emphasis added) (See **Firstier Mtge. Co. v. Investors Mtge. Co.,** 498 US 269, 275 (1991).

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted.

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COUNSEL OF RECORD

OCTOBER 1994.